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OVERSIGHT LEGISLATION

HEARINGS

BEFORE THE

SELECT COMMITTEE ON INTELLIGENCE

OF THE

UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S. 1721 and S. 1818

OVERSIGHT LEGISLATION

FRIDAY, NOVEMBER 13, 1987, FRIDAY, DECEMBER 11, 1987,
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CONTENTS

Hearings held in Washington, D.C.:

Page
November 13, 1987 1
December 11, 1987 49
December 16, 1987 193

Statement of:

Armacost, Michael, Under Secretary of State for Political Affairs 248
Carlucci, Hon. Frank, Secretary of Defense 197
Clifford, Hon. Clark, former Secretary of Defense 224
Cohen, Hon. William, a U.S. Senator from the State of Maine 4
Cooper, Charles J., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice 81
Fowler, Hon. Wyche, a U.S. Senator from the State of Georgia 39
Glenn, Hon. John, a U.S. Senator from the State of Ohio 20
McHugh, Hon. Matthew, Chairman, Subcommittee on Legislation, House Permanent Select Committee on Intelligence 110
McMahon, John, former Deputy Director of Central Intelligence 241
Rudman, Hon. Warren, a U.S. Senator from the State of New Hampshire. 49
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania 29
Stokes, Hon. Louis, Chairman, House Permanent Select Committee on Intelligence 107

Prepared statements, letters, supplemental materials, etc.:

Boren, Hon. David, a U.S. Senator from the State of Oklahoma, Prepared statement of 64
Bowsher, Charles A., Comptroller General of the United States, a letter to Senator John Glenn dated November 12, 1987 29
Carlucci, Hon. Frank, Secretary of Defense, prepared statement of 200
Cooper, Charles J., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, prepared statement of 88
    Written response to Senator Specter concerning testimony on December 11, 1987 174
Cranston, Hon. Alan, a U.S. Senator from the State of California, prepared statement of 2
DeConcini, Hon. Dennis, a U.S. Senator from the State of Arizona, prepared statement of 12
Fowler, Hon. Wyche, a U.S. Senator from the State of Georgia, prepared statement of 43
Henkin, Louis of Columbia Law School, a letter to the Honorable Louis Stokes dated March 31, 1987 114
Memorandum for the Attorney general dated December 17, 1987 regarding the President's compliance with the "timely notification" requirement of Section 501(b) of the National Security Act 126
Murkowski, Hon. Frank, a U.S. Senator from the State of Alaska, prepared statement of 4, 61, 195
NSSD 286, extract from 203
Reagan, President Ronald, a letter to Senator Cohen with respect to Section 501 101

Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania:

    Statement on S. 1818, The National Security Reform Act of 1987 33
    Statement on S. 1820, the National Intelligence Reorganization Act of 1987 36
Tribe, Laurence H., Professor, Harvard Law School, a letter to Bernard Raimo, Jr., dated February 24, 1987 113
Van Alstyne, William, Professor, Duke Law School, a letter to Bernard Raimo, Jr., dated March 2, 1987 119

OVERSIGHT LEGISLATION HEARING

FRIDAY, NOVEMBER 13, 1987

United States Senate,
Select Committee on Intelligence,
Washington, DC.

The Select Committee met, pursuant to notice, at 10:18 o'clock a.m., in room SD–562, Dirksen Senate Office Building, the Honorable David Boren, chairman of the committee, presiding.

Present: Senators Boren, DeConcini, Cohen, Roth, Specter and Hecht.

Staff present: Sven Holmes, staff director and general counsel; James Dykstra, minority staff director; and Kathleen McGhee, chief clerk.

PROCEEDINGS

Chairman Boren. We'll go ahead and proceed with the hearings. There are several members of the committee that are expected to attend this morning, and there is a vote still in progress on the Senate floor. So I am sure that is the reason that some of the members are delayed that plan to attend. But I think for the sake of sparing time we will go ahead and commence the hearing at this point.

Of course, ever since the Iran-Contra matter all of us have felt a renewed obligation to strengthen the oversight process. While we recognize that secrecy is necessary in the conduct of some programs of this government for the sake of our national security interests, I think all of us share a deep commitment to making certain that those programs are conducted with appropriate oversight and appropriate accountability by the people in office who are elected by the people in this country.

We have already a number of ways undertaken in the committee to strengthen the oversight process. First of all, we have made more systematic our own oversight over all programs of the intelligence community. We now have systematic review of all covert action programs in place, those that are active and those that are at this time relatively inactive. This kind of systematic and comprehensive oversight I am convinced is the best way to assure the kind of accountability that all of us want. We can have adequate rules on the books, but if we don't have a mechanism for making certain that those rules are being enforced and that those procedures are being followed, we will not have full accountability. So the kind of systematic approach that we have established with the committee, following each program on a regular basis, having a quarterly review of all outstanding covert action programs by all members of the committee is very, very important. In addition to that, we also have compartmented the staff and have various members of the staff on a segmented basis, making certain that every single program is being followed in a detailed way.

We're moving now to strengthen the internal audit capability of the Intelligence Committee, so we can make spot checks on programs to make sure that funds are expended as intended. We're also now in a systematic and regular way providing oversight over the analytical side of the intelligence community, to make sure that the intelligence is objective and it is not being subjected to any kind of improper political influence.

This morning we are meeting to consider additional proposals that are being made in terms of strengthening the statutory provisions to make certain that our committee receives the information that it needs for timely and efficient oversight. We are having these hearings to hear from the principal authors of legislative proposals designed to strengthen the oversight process.

In order, we will be hearing from Senator William Cohen, Vice Chairman of this committee; Senator Glenn, Chairman of the Committee on Governmental Affairs; Senator Arlen Specter, a member of the Intelligence Committee; and Senator Wyche Fowler. We have scheduled each speaker this morning for a presentation of approximately 20 minutes, with an additional 10 minutes for questions and answers.

It should be noted that the purpose today is merely to introduce each piece of legislation to the committee. The committee intends to pursue these matters in depth at a later time. Moreover, at the present time, it is our intention to proceed with hearings as soon as possible on the bill introduced by Senator Cohen. Since this bill involves issues raised in the bills introduced by Senator Specter and Senator Fowler, these issues can and should be considered as part of this process. Of course, with respect to certain of these issues, it may be that more exhaustive examination is necessary and appropriate, in which case they will be held over for consideration in 1988. It is hoped that we will be able to mark up legislation in this important area either before or immediately following the December recess.

Also, at this time I will place in the record, without objection, the statement of Senator Murkowski and the statement of Senator Cranston, who cannot be with us today.

[Prepared statements of Senators Cranston and Murkowski follow:]

PREPARED STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Mr. Chairman, I believe this hearing is timely and necessary.

It is time to revisit the question of the adequacy of our ability to conduct thorough oversight of the intelligence activities of our government. At the very least we should tighten up reporting requirements and oversight of covert action programs.

I look forward to learning the views of my Committee colleagues regarding the revision of intelligence oversight statutes.

Mr. Chairman, I am new to this Committee. The oversight process is young. Our Committee is merely a decade old. In many ways this Committee is in its adolescence. We are finding our way in conducting good oversight; and the agencies we oversee are continuing to adjust to the relationship.

We must remember that we have generations of people in the intelligence agencies who have little or no experience with Congressional oversight. They have been used to working without Congressional scrutiny and very much on their own. So a certain amount of tension between the executive and legislative branches of government is inevitable and healthy.

I approach the subject of this hearing with a view toward strengthening the oversight process and making sure we have the tools to do our job.

I wish legislation were not necessary. I wish we had a more trusting relationship with the executive branch and the intelligence agencies.

But time and time again, I think we find that we must give far clearer instructions about where to draw the line between the reasonable and the unreasonable. It seems we cannot afford to leave anything unsaid or unspecified.

Who would have imagined that a President could have interpreted the legislative requirement to inform the Intelligence Committee's of a covert action "in a timely manner" as meaning months, years. Congress is left with little choice but to specify that "in a timely manner" means days as has been done in the Cohen-Boren bill.

I believe we must also put into law the principle that covert actions should not run counter to public policy. In my view, the sale of arms to Iran did not accord with public policy. It was not a policy the American people would endorse. Its objectives were contrary to the objectives of the Administration's publicly articulated foreign policy. The Iran operation violated the Administration's policy on terrorism; and its specific policy toward Iran.

Mr. Chairman, I believe the bill you and Senator Cohen have introduced is a good one, and I intend to support it. I also believe that if the bill had been in effect several years ago, it would have been more difficult for an Iran-Contra situation to have occurred.

Could it have happened anyway? Maybe.

Is your bill airtight? Probably not.

Could it happen again? I hope not.

But I have learned in the intelligence business "never to say 'never' ".

In fact, I often find myself agreeing with the late Senator Phillip Hart who wondered whether any Committee can effectively control covert actions. Or whether we in Congress would necessarily know about renegades operating inside the intelligence apparatus and outside or on the margins of the law.

We certainly have no hope of conducting effective oversight of covert action programs if we are never told about them—a situation that the current broad interpretation of the law effectively permits.

While I therefore intend to support your bill, I do so urging that we not feel as if we have solved "the problem" and that it won't happen again.

Mr. Chairman, I would like to close with a couple of comments on one of my colleagues' bill and with a suggestion for an addition to the Cohen-Boren bill.

First, I want to commend the proposal of my colleague, Senator Glenn, who has suggested allowing the General Accounting Office to conduct independent audits of covert operations. While I know the Committee has initiated its own internal auditing capability, I question whether two additional staff members will be adequate to conduct thorough, systematic auditing of covert action programs. It is important to assess realistically what the Intelligence Committee is capable of doing internally. While I am willing to take a wait and see approach now, I urge a thorough review of Senator Glenn's proposal.

Second, Mr. Chairman, I am deeply concerned about the lack of correlation between the limits and conditions that apply to overt arms sales and those that apply to the covert areas.

Under the Arms Export Control Act, the Administration is required to meet certain limitations and requirements when it proposes an overt arms sale to foreign governments. For example, the sale must meet certain purposes stated in the Act; the recipient must promise not to resell without U.S. permission; the U.S. cannot sell to countries who provide support to terrorists—among other requirements.

Yet these limitations appear to apply only to overt transfers made under this Act—not to covert arms transfers.

I think we would all agree that our arms sale policies are significant. And that these requirements would have relevance whether the arms transfer was overt or covert. Yet I do not believe these principles are applied on a systematic basis to covert arms transfers.

Mr. Chairman, I believe that we should be made aware if and when a covert arms sales would otherwise violate or undermine the overt policy contained in the Arms Export Control Act or other statute. I suggest that we include in the Cohen-Boren bill an additional provision in the justification of a Finding to include an analysis of whether a proposed arms transfer violates or undermines, in whole or in part, any existing statute or contradicts stated U.S. policy.

Mr. Chairman and Mr. Vice-Chairman, I would like to work with you to ensure such a provision is included in oversight legislation reported out by this committee.

Thank you Mr. Chairman.

Prepared Statement of Hon. Frank Murkowski, a U.S. Senator from the State of Alaska

Mr. Chairman. As Americans, we are citizens of a free society, but we are also citizens of a superpower that must conduct foreign policy world-wide under often difficult and dangerous conditions. These conditions require the United States to maintain a large, highly professional intelligence capability. These intelligence agencies, lead by the CIA, are tasked to provide the best possible information to policymakers regarding the dangers and opportunities that face us. The CIA also maintains a covert action capability that can be used in those special circumstances when vital interests are at stake, but when diplomacy is ineffective and military force is inappropriate.

We are all aware of the potential tension between the requirements of democracy, on the one hand, and the needs of intelligence on the other. This is a tension that is not easily reconciled, as the recent Iran-Contra affair demonstrates.

Nevetheless, we must succeed—freedom and security must both be served. It is the task of Congress to resolve the dilemma through effective legislation and oversight that will assure our freedoms are preserved while the Nation's security is protected.

Therefore, Mr. Chairman, I welcome today's hearing as it addresses these two critical needs.

Chairman **Boren**. We will begin today's hearing with consideration of S. 1721 of which Senator Cohen is the principal author. Senator Cohen, I recognize you at this time.

STATEMENT OF HON. WILLIAM COHEN, A U.S. SENATOR FROM THE STATE OF MAINE

Senator **Cohen**. Thank you very much, Mr. Chairman. Let's see if I can exhaust all of the areas of questions you might have.

I am pleased to take the witness stand before this distinguished committee—something that is a rarity for me—and to present the features of S. 1721, which I recently introduced to improve our oversight over the intelligence activities of this country. And I might point out that I am especially pleased, Mr. Chairman, that you have seen fit to cosponsor this bill. It once again demonstrates your abiding wisdom and unerring judgment.

In addition to yourself, there are three other members of the committee, Senators Bentsen, DeConcini and Murkowski, who are also cosponsors of the bill, as well as Senators Inouye and Rudman, the Chairman and Vice Chairman of the Iran-Contra Committee. And finally my esteemed colleague from Maine, Senator Mitchell, who's also a member of the Iran-Contra Committee.

Indeed, I think it's no accident that these Senators are cosponsors. Both the Inouye Committee and this committee have been confronted, in the context of the Iran-Contra affair, with conduct on the part of the Executive branch which we thought could not take place under the current system. The oversight regime as structured in 1980 was the result of compromises which were intended to provide the Executive branch with flexibility. But in the final analysis, the precise use of this flexibility depended on the goodwill and cooperation of the Executive branch. And having heard justifications for such conduct based upon interpretations of current law which seemed fundamentally at odds with our own, it has become apparent to me that not only does the law need clarification, but it needs to be strengthened as well.

I think it is clear that Congress simply cannot afford to find itself left out of the process altogether, as we were during the Iran-Contra affair. And yet I think we have to accept the fact that under current law, this is still a very distinct possibility. The ambiguities and the gaps in the current law which were cited by some in the Executive branch to justify keeping us in the dark are still there. This is not to say that we should enact a law so rigid that the President could not react quickly when circumstances require. Nor should we fail to recognize that the information at issue here often requires extraordinary protection. But the law must ensure that Congress will be advised and consulted in an appropriate manner whatever the circumstances might be. The Iran-Contra affair has shown us we cannot rely solely upon the Executive's commitments to comity and to promises of cooperation.

S. 1721 would provide an oversight framework with far greater certainty in terms of the responsibilities of the President toward Congress, but without preventing or in any way inhibiting the execution of his responsibilities under the Constitution. The bill does not prevent the President, for example, from using third countries, such as those referred to in the Iran-Contra hearings as country 2, 3, or 4, to provide support to U.S. objectives, nor would it prevent him from using the General Secords of this world if he chose to do so. But it would requrie that he tell the Congress what he intends to do and give us a chance to react to it. The general approach taken by S. 1721 is not to prohibit the President from doing things he regards as necessary to carry out his constitutional prerogatives, but rather to strengthen the oversight of those actions by Congress itself. And in my view, requiring the President to consult with and notify the Congress in matters crucial to the nation's security is consistent with the constitutional responsibilities of each branch.

In the interests of good government, the Executive should never be permitted to go it alone. Covert actions are actions which the United States takes in secret to influence events in other countries. They are necessary to pursue goals that we are unable to achieve through diplomacy and yet which fall short of justifying military action. They ought to be undertaken only as a last resort, and only in support of U.S. foreign policy objectives. Within both the Executive branch and Congress, the process of undertaking such actions ought to be rigorous. Covert actions should not be easy. They ought to be able to withstand the skeptical questioning. As the President himself has said, they ought to "make sense." But unless they are subject to critical review by the Congress, this may very well not happen, as the Iran-Contra affair so vividly demonstrated.

I am pleased that the President has committed himself to a course very similar to that contained in this legislation. Indeed, he has pledged to consult with this committee in the future and, again I'm quoting, "in all but the rarest of circumstances", he's agreed to notify us of covert actions in a timely manner, which he defines as being within 2 working days of initiation of the activity. Now he has also addressed many of the specific shortcomings demonstrated by the Iran-Contra affair. By way of example, oral findings would be utilized only in emergencies and they would be reduced to writing within 2 working days. There would be no retroactive Findings and all of the covert actions would be subject to periodic review. For these actions, I think we have to commend the President and his administration.

But these steps don't bind future administrations and indeed, in the final analysis, they don't even bind this one. As we saw repeatedly in the Iran-Contra affair, an administration can ignore its own policies and procedures regarding the approval of covert actions. There is legally nothing to stop this or subsequent administrations from ignoring the new restrictions or issuing classified exceptions or waivers to them. And, moreover, by citing "rare circumstances", the administration retains the option of keeping Congress out of the process altogether. While I accept its assurances to the contrary, its recognition that no covert action can succeed for long without the support of both branches, the temptation may become strong, depending upon the circumstances, to break faith with Congress in the interests of what may be perceived as "a greater good." In such circumstances, where normal procedures are strained, having a clear statutory requirement on the books provides far greater assurance that the system is going to be adhered to.

S. 1721, which is now before the committee, provides the clarity which I believe is lacking in the existing law.

First of all, the bill would place all the laws bearing upon intelligence oversight in one place in the United States code. It would restructure those laws in a logical, coherent fashion. And accordingly, the Hughes-Ryan amendment, which was an amendment to the Foreign Assistance Act of 1961, would be moved to that portion of the intelligence oversight statute which deals with limitations on funding intelligence activities. Moreover the limitations set forth in the Hughes-Ryan Act would be expanded to cover agencies of the Executive branch other than the CIA which might be used to carry out covert actions.

Second, the bill would eliminate much of the ambiguity under current law by specifying those congressional oversight requirements which pertain to intelligence activities and those which pertain to covert actions.

Third, the bill would provide for the first time explicit statutory authority for the President to authorize covert actions or special activities in support of U.S. foreign policy objectives, provided they are authorized in accordance with the requirements set forth in the legislation. Each Finding must be in writing unless an emergency exists in which case oral approval must be reduced to writing within the 48 hours of the decision. A Finding may not retroactively authorize special activities. Findings must include identification of all U.S. Government agencies and entities who will fund or otherwise participate in a special activity, as well as identification of third parties that will be involved. And finally, no Finding may authorize any action which is contrary to the statutes of the United States.

I think most importantly the bill provides greater certainty in terms of notification to Congress of covert actions. It would require that the intelligence committees be notified of all Findings as soon as possible after they are signed. But in no event more than 48 hours. Where the President determines that it is essential to limit access more narrowly, the bill authorizes him to notify the leadership of both the Houses—both Houses and the Chairmen and Vice Chairmen of the intelligence committees. This provision recognizes that there may be occasions of extreme urgency in which prior notice to the 2 intelligence committees is not practicable. It also recognizes that there may be covert actions of such sensitivity that more limited exposure of the information at issue may be desirable. But it nevertheless ensures at a minimum that representatives of Congress will be advised within 48 hours of a Finding having been signed and that an administration could not legally keep Congress in the dark for almost a year.

Mr. Chairman, as I said when the bill was introduced, I am amenable to changes in the bill. But I do think it represents a significant improvement over what we have now. With your support and leadership, I think we have the opportunity to create a more effective framework for the oversight of our responsibilities in this area.

I might point out that I can recommend changes already. There is an ambiguity or certainly an inconsistency, for example, in that area dealing with oral Findings were the President takes action and then reduces the action to writing within 48 hours. It should be clear that there is only one 48 hour period, that we not have 48 hours reducing it to writing and then another 48 hours to notify Congress. So that can be clarified rather easily, but that's one area at a minimum that ought to be changed.

Chairman BOREN. Thank you very much, Senator Cohen. I think this legislation builds very well on the previous work of the committee. The committee deliberated together before sending a letter to the President earlier this year and, of course, we had, as you have indicated, the President's positive response to many of the points raised in the committee proposals as well as the implementation through internal process within the administration of many of these procedures. But as you have also pointed out, they have not been placed in the statute and those procedures, therefore, would not be binding on future administrations without enactment of legislation.

I have just 2 or 3 questions. One, how would you answer those who would raise the question of whether or not this bill would pass Constitutional muster? As to whether or not it would be an infringement upon the powers of the President under the Constitution as Commander-in-Chief and whether or not it would unduly inhibit his ability to respond as Commander-in-Chief to some kind of unforeseen emergency situation?

Senator COHEN. Well, first of all, I would point out that none of us are in a position to reach some final conclusion as to what a Supreme Court might rule by way of a Constitution interpretation.

But second, I think we have given careful consideration to be sure as best we can that we not intrude upon the constitutional prerogatives of the President. As a matter of fact we specifically point out in the legislation that nothing in the bill purports to take anything away from the President. You and I have had this discussion before and it has given me occasion to demonstrate my background in Latin. There was a phrase, of course, in the law that said nemo dot quo non habit. That means, you can't give what you don't have. We cannot give to the President powers he does not have under the Constitution and survive scrutiny by the court, nor can we take away powers through legislation that are probably those of the President.

What this legislation really says is that we don't intend to infringe upon the President's powers. By the same token, we intend to define those areas where we believe we are properly exercising our own Constitutional responsibilities.

Chairman BOREN. In fact, you do provide expressly that we do not limit the President's constitutional powers to act in an emergency, although we are requiring notification within a certain period of time after that action?

Senator COHEN. Nothing in this bill prevents the President from taking action as consistent with his powers. But the bill does set forth the requirement for notification to the Congress of that action.

Chairman BOREN. Just a couple of other brief questions. On page 5 of the bill, you refer to each Finding specifying any third parties including any foreign countries that are to be involved in the carrying out of these activities in accordance with procedures to be established.

What do you envision? What kind of mechanism would be utilized to establish procedures under which the committee would be notified of third parties or foreign governments that were involved?

Senator COHEN. Well, this legislation would require the Finding itself to identify third countries and third parties. This is a matter of some dispute. I know that the House bill, for example, does not impose such a requirement. It merely requires specifying that third parties or third countries being called upon, followed by a notification to the intelligence committees outside of the Finding itself. And that might be, in fact, a better solution than what I have proposed.

There is concern on the part of foreign governments that they might be compromised in some way by being identified in a Finding. We should be sensitive to that. Nonetheless, what the language is intended to do is to make sure that we force a President, any President, to put his own bureaucracy on notice as to exactly what is being undertaken so that we don't have a situation in which third countries are being called upon to carry out certain activities that are unknown to Cabinet members or Members of the Cabinet. We don't want to have a situation in which we utilize third parties who might have either a conflict of interest or who might in fact not be held in high regard by those very institutions designed to carry out the actions.

So it's really designed to put the President—to force the President to notify his own establishment, his own bureaucracy of what is taking place, and then to provide a formal mechanism whereby the committees can assure themselves that we are not being put in a position where third countries are providing aid or assistance and expecting some sort of a quid pro quo. I think these are issues which have to be resolved and I'm open to any responsible suggestions.

Chairman **Boren**. So, the way you have this phrased would really give some flexibility. In other words, if the President might hypothetically state in a Finding it is contemplated that third countries or private parties might be and likely will be utilized in the carrying out of this particular activity if there were agreed procedures put in the place by which the committees might be separately notified then of the identity of these countries or the identity of these individuals under previous agreement.

Is that what you are really allowing here? That it wouldn't necessarily have to be spelled out in the Finding itself as long as there were agreed upon procedures otherwise to assure sufficient information was provided.

Senator **Cohen**. That's correct.

Chairman **Boren**. I would just ask one last question. On page 6 of the bill, subsection 5, there's this provision, a Finding may not authorize any action that would be inconsistent with or contrary to any statute of the United States. I wonder if you might expand upon your reason for including that provision and define for us exactly what the effect of that provision would be.

Senator **Cohen**. Well, specifically, Mr. Chairman, that provision is designed to respond to a statement, not just a suggestion, but a rather categorical statement that was issued during the course of the Iran-Contra hearings by Judge Sporkin. He asserted that you could have a law on the books, a public law, that a President could avoid or evade complying with that law by declaring a program to be "black" or covert, make the program covert, and then not even notify Congress within a 15 or 16 month period until the activity was actually completed. So in essence, you would have a law that was being violated through another mechanism with no notice to Congress itself.

I found that hard to accept, and yet it was reinforced by Mr. Cooper from the Department of Justice who came to a similar conclusion that you, in fact, could have a separate activity that was inconsistent with and indeed violated the public law.

This provision is designed to prevent that. If we have a law that is passed, you cannot have a covert action that is inconsistent with and violative of that law.

So it is specifically designed to counter that notion which has apparently received considerable discussion within the administration.

Chairman **Boren**. What would happen hypothetically if there was some immediate need for the President, some unforeseen emergency to move large amounts of military supplies or to give large amounts of military supplies to another country? And this had to be done immediately. Totally unanticipated. Could he do that under this bill even though to move immediately without some sort of concurrence if it were, let us say, above the dollar figure in the Arms Export Control Act? Could he move immediately to do so, then with appropriate notification to the committees?

Senator **Cohen**. Well, I believe that they are under the Arms Export Control Act. There would be no prohibition from the CIA moving arms as such. That does not pertain as it is written to the Central Intelligence Agency. So I would have to see exactly what was in mind. But basically he would have to comply with the existing law.

I believe that there is flexibility in the Arms Export Control Act which allows the Agency to actually move arms as such. But again we have to insist that that's going to be the case—that there would be with notification to the appropriate Committees.

Chairman BOREN. Are there other questions from members of the committee at this time?

Senator Specter?

Senator SPECTER. Thank you very much, Mr. Chairman.

Just a couple of questions since I'll be testifying in due course myself.

First, Senator Cohen, I think you have a very good bill. I do believe that it is important that the Intelligence Committee take the leadership and push forward for legislation because we ought not to lose the momentum of what we have discovered as a result of the sale of arms to Iran.

Just two points at this time. The existing law talks about the Director of CIA informing the Senate Intelligence Committee and the House Intelligence Committee fully and currently. Your bill refers to notice as soon as possible. I use a little different language in mine. I use the word contemporaneously. My intention is to encourage the Executive branch to let the Intelligence Committee know about what is going on at the earliest possible moment. There is no intent to have the Intelligence Committees control or exercise veto power, but rather to allow the Intelligence Committees to have input at the very earliest opportunity in order to lend the wisdom, developed in these 2 Committees, and perhaps prevent errors before they move too far along the line.

Now the existing law calls for "fully and currently." And it seems to me that is a thrust of existing law. I would like your judgment as to how we might legislate, if at all, to encourage notice concurrently, perhaps even in advance, and what value you see in having that kind of input by the Intelligence Committees, even before the Executive branch moves.

Senator COHEN. Well, first of all I think the "fully and currently informed" requirement pertains overall to intelligence activities. I think that it's clear that neither this Committee nor the House Intelligence Committee is going to be in a position to be in on every day to day decision about intelligence activities. I think the Agency should keep the committees apprised generally of their operations. Certainly to update us on previously approved covert actions, any major new initiative, to keep us apprised of that.

But there is no intent in this legislation or I think in prior legislation to make the intelligence committees partners in each and every working day decision. So I think we need not legislate in that particular area.

With respect to covert actions, however, I do think that the emphasis ought to be on prior notification. I think that is the history of the intelligence committees' concern, that we learn in advance of a contemplated action. And that way the committee would at least be able not to stop the action, not to veto it, but as you suggested, to give the benefit of our insight into the process whether or not it would be acceptable to legitimate expectations of our constituents. So the emphasis ought to be on prior notification.

I think this legislation has tried to take into account that there might be some unforeseen circumstance in which prior notification is either not possible or desirable and then provides the opportunity for the President to take action and notify us within a 48 hour period.

It's really designed to provide a limited opportunity for the President. There is always a danger that that limited opportunity could be expanded and used as a license, as it was during the Iran-Contra affair in my judgment. But, nontheless, I felt that this was a responsible way to try to address it.

Senator **Specter**. My second question and final question. Senator Cohen, you refer to the goodwill of the Executive branch. And I quite agree with you that it is not possible to have the respective functions of the Executive and Legislative branches carried out without goodwill. We've got to have cooperation from the Executive branch and, in turn, the intelligence committees have to maintain secrecy. We have to do our job. And I think a better job has been done during the past year on that subject.

But, I'm very much concerned about the sufficiency of goodwill. I have a provision in my bill which calls for a mandatory jail sentence for anyone who provides false information to any committee of Congress. It might be that that provision ought to be limited most specifically to the Intelligence Committees which take testimony in secret where we have no overall check. If somebody testifies falsely before a committee publicly, it may be discovered through television, newspapers or radio reporting.

On testimony given to the Intelligence Committee in secret, we have very little opportunity to have any kind of corroborative check of that sort. My question to you at this time is to what extent, if at all, do you think that our committee has suffered from false information which has been provided to it?

Senator **Cohen**. Well, I think our committee has been the recipient or the beneficiary of some misleading information and indeed, on 1 or 2 occasions, false information. If not actively false by witnesses sitting at a table while a misleading statement has been made, then not volunteering to correct it. So I would say that the evidence is clear in my mind to that extent.

With respect to having a mandatory sentence, I think it's worth looking at it. But frankly I also—you as a former prosecutor, and others as well—also realize that the more mandatory something becomes, the more likely that it might actually have a counterproductive result. For example, we might find our witnesses refusing to volunteer very much information without looking over their shoulder at an attorney sitting behind them constantly saying, "Is it all right to say this, or should I perhaps be more limited, less forthcoming. After all, I've got a jail sentence hanging over my head. If someone should construe this as being either misleading or false, at some time in the future I've got a problem." So they tend to be more constrictive.

I think your suggestion is certainly worth exploring. And I would not preclude it by any stretch of the imagination. I'd be willing to consider it. But I also think we have to see the downside of it and that is that we might have a situation where witnesses insist on going off the record more. Can we go off the record, Senator Specter, so I can discuss this more freely. And you may have a situation where people are constantly trying to move off the record so they don't have to face a potential sentence because someone says that wasn't quite accurate. Or that was actually misleading or false.

So, I'm not—I don't carry any brief for people who come before the committee and either actively mislead us or lie to us. I think they ought to be punished. I think at a minimum their jobs should be on the line and they should face whatever penalties the law provides.

By making it mandatory, I think it might actually work to our disadvantage rather than our advantage. But I think we ought to consider it.

Senator SPECTER. Well, I'll go into this more fully when my turn comes to testify. But I think it appropriate to point out now that in order to qualify for a crime it has to be willful. My statute provides that if witnesses recant within 5 days, they avoid the criminal penalty; I don't seek punishment or vindication or even deterrence—none of the characteristic objectives of the criminal law in terms of those traditional objectives. What I'm looking for is simply a means for this committee to carry out its function. I don't believe we can unless we get accurate information. And I am very much concerned that we have not gotten that kind of information in the past.

Senator COHEN. Well, I agree with you in terms of the truth being indispensable to our carrying out our function. I would say that though there have been exceptions, for the most part, the administration witnesses who have come before us, those from the Agency and elsewhere, have been forthcoming and candid. That has been marred by the Iran-Contra affair.

I would not want to see one example taken to override the good performance on the part of many, many of the witnesses who have come before us.

Senator SPECTER. Thank you very much.

Chairman BOREN. Thank you, Senator Specter.

Senator DeConcini? Any questions at this time?

Senator DECONCINI. Mr. Chairman. First, let me thank you for holding these hearings. I think they are extremely productive and I am a cosponsor of Senator Cohen's bill. I appreciate the effort that you, he, and others have put in it.

I would ask, Mr. Chairman, that my statement appear at the beginning of these hearings.

[Prepared statement of Senator DeConcini follows:]

PREPARED STATEMENT OF HON. DENNIS DECONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Mr. Chairman, I am pleased to be here today to express my support of the Intelligence Committee's effort to examine legislation designed to improve our ability to fulfill our oversight responsibilities of intelligence activities conducted by the U.S. government.

Almost a year has passed since we were shocked to learn that our government had sold arms to Iran, a nation whose official policy endorses and supports international terrorism. Even before we had time to recover, the news worsened when it was revealed that proceeds from these illegal arms sales had been used to support the contras.

Clearly, the need for a thorough re-examination of the Congressional oversight process has never been greater. The medium in which the Iran-contra scandal grew must be changed so that such abuses of power do not occur again.

While last summer's agreement between this committee and the President was a step in the right direction toward ensuring that the executive branch would notify Congress of pending covert actions, this agreement does not have the force of law such an important process deserves.

It is for that reason, I was pleased to be one of the original co-sponsors of Senator Cohen's bill, which removes any ambiguity that may have existed in earlier legislation, while simultaneously strengthening the base on which the Congress and its intelligence committees build their oversight efforts.

Senators Specter and Fowler have also introduced legislation which speaks to the subject of congressional notification of covert activities, and the provisions of these bills would reduce the likelihood of a repetition of the ill-advised events which precipitated the sale of arms to the extremist government in Iran. Their proposed legislation, as does Senator Cohen's would leave no questions about when and if the Congress should be included in the process which governs the implementation of intelligence activities.

Accountability is another important component of oversight. And while I wholeheartedly support the creation of audit positions on the staff of the Senate Intelligence Committee, the Senate does not have the resources to sponsor an audit capacity sufficient to monitor the financial transactions and activities of an agency with the breadth of the CIA.

Both Senators Glenn and Specter have offered bills which would mandate accountability at the CIA, where we now have only self-regulation.

At the time, the CIA is the only entity in the intelligence community which denies the General Accounting Office audit authorization, even though the GAO has established a praiseworthy record in its review of some of our government's most sensitive programs, programs which I am certain are as sensitive as any which are carried out by the GAO.

Senator Glenn's bill would give the chairmen and vice chairmen of both the Senate and House Intelligence Committees the ability to authorize GAO audits of the CIA. Carefully drawn safeguards to minimize the risk to national security have been included in the legislation.

I believe the benefits which would result from the GAO's authority to conduct these professional and impartial audits would flow not only to the Congress, augmenting its ability to carry out its oversight responsibilities, but also to the CIA, which would become more credible.

There could not be a more apt time to establish an independent Inspector General at the CIA. Under the present system, there exists only an in-house IG, who I know provides valuable services, but through the very nature of his in-house position, his investigations and conclusions can never be viewed without questioning the depth of his independence.

The establishment of an independent inspector general at the CIA would result in reports in which everyone could have confidence. Today's climate of skepticism about the honesty and candor with which CIA programs are reviewed and reported to the Congress would be replaced with certainty about the integrity of information provided by an inspector general whose independence was guaranteed by law.

And not incidentally, as has been the case at other federal agencies where IGs have been established, significant savings in resources would result from their work.

It is for these reasons that I have joined Senator Specter in co-sponsoring this bill.

All of the measures before the committee today result from the deep dissatisfaction of the Congress with the present situation, which must be changed so that we in the Congress are able to work with those in the intelligence community in an atmosphere of trust.

Senator DECONCINI. Senator Cohen, I would like to ask you if you have given any thought to building auditing procedures into your bill? Have you thought about including penalties for willfully giving misinformation to the Congress? This seems to me to be a very positive measure. Also worth our attention is Senator Glenn's bill, which is very attractive.

I wonder what your thoughts are about Senator Specter's bill, which establishes an Inspector General. Did you consider incorporating provisions in your bill to create an Inspector General?

Senator COHEN. I think I indicated in the beginning of my testimony that the bill by no means is complete. It is open to improvement. One of the areas that we have been deficient in and one that I think is highlighted by Senator Specter's concerns and that the Chairman wanted to address involves having some capability, some audit capability that we didn't have before.

We now, as a committee, have insisted upon having our own independent audit capability to check at least on a spot basis, various areas that we would be concerned about. That may not be sufficient. It may be that we would want to have some independent audit capability.

Senator DECONCINI. If you would yield? I'm pleased with the leadership you and the Chairman have taken to create our own audit capacity at the committee. But I'm concerned about the need for a more extensive audit to be sure that there is an Inspector General or some other independent auditor looking at these procedures.

Senator COHEN. Well, we had a comparable experience in the Department of Defense where we finally passed legislation providing for an Inspector General that was heavily opposed by the Department. I think it has worked rather well. And frankly it might be an area that we would have to look at here.

Senator DECONCINI. You are willing to look at that? Thank you. Thank you, Mr. Chairman.

Chairman BOREN. Thank you very much, Senator DeConcini.

I would say that in listening to all of these proposals today as we enter into the markup process, it is very possible that we will put some of the building blocks of various parts of these proposals together in whatever bill the committee decides to report out.

I would also say that the committee already has acquired the services of a Chief Auditor. The Assistant to the Chief Auditor will be selected by the end of this week. And the auditing plan ought to be available for the members of the committee by next week. So we are really moving forward in terms of establishing our own internal auditing capability and working hard to live up to our trustee role for the rest of the Senate to make certain that we're getting all the information we need and that we're carefully evaluating that information.

Senator DECONCINI. If the Chairman would yield? My concern is that are there other people in the administration and in particular the President and perhaps the Vice President, the National Security Council who would be more at ease, too, if there was an Inspector General?

Chairman BOREN. Yes sir. I think that's a real question to be raised. And, of course, the provision of an Inspector General is in the Specter Bill.

I might say that we are trying to parallel the procedures that we are following in our own committee now with the procedures of the National Security Council. For example, our quarterly review of all covert actions is being paralleled now by the National Security Council with their quarterly review and with their regular report to the President. So we are seeing more oversight at both ends of Pennsylvania Avenue on a cooperative and a timely basis which I think is going to be very helpful. I think the Administration internally may well want to build upon some of the improvements of the oversight process that we are establishing ourselves.

But I think your point is well taken. And we will, certainly, as we approach the markup of legislation look at all of the proposals of the legislation that we are hearing today.

Senator Roth? Any questions at this time?

Senator Roth. Yes. I'd like to make a comment or two, Mr. Chairman.

First of all, I do think a number of changes in our procedures that have been brought about under your leadership and Senator Cohen's are indeed worthwhile and I congratulate you for incorporating them in this legislation for the reasons already outlined.

I do want to give a cautionary note, however. I'm concerned that every time we have a bad example the tendency in Congress is to begin to adopt a lot of new legislation to meet that supposed problem. And frankly I think rather than helping the situation in many cases we only compound it.

As a leading illustration of that, I just point to military procurement. I think much of the problems we have in that area have been compounded by the constant new laws and regulations that are to meet a specific situation rather than a general one.

So one thing I like about your legislation here is that I think it deals more with procedure. But I still am concerned, Mr. Chairman, that we will adopt legislation that appears to help but will only compound the monitoring of the intelligence operation.

I for one look with great skepticism, although I may change my mind later down the road, at adding to the bureaucracy of the intelligence community. I think any organizational thing—and I say to the distinguished Chairman of Government Affairs—I think that we ought to take a hard look because as we are trying to keep prices—I mean the deficit—down, many times we help build it up by suddenly proposing new bureaucracies.

And second, I'm very much concerned that we don't begin to adopt a lot of new laws and regulations that really don't meet the needs. What are we trying to resolve today? I think that is the important question. What are the problems that have been exposed by the experience of the Iran situation.

I'll have to be candid with the distinguished Senator from Pennsylvania that I have some concern about the mandatory penalty provisions already addressed by Senator Cohen. Perhaps that will help. But I can see where it may have the opposite effect as Senator Cohen has pointed out. Many individuals may not want to testify or will water down so that we will not get very meaningful information. So I think that has to be looked at very carefully.

But there is another side of the coin if we are going to impose severe penalties, stiffer penalties, and maybe we should. I remain open on that question. I think it's time that Congress and this committee begin to consider also a bill of rights for the witnesses that appear before us. There are no limitations as to how they can be questioned. And if they are going to be exposed to tough penalties, then I think it's about time that we give some thought as to whether there is a need for our committee, or Congress as a whole, to establish certain rights for those individuals who appear before us.

McCarthyism has become a common word in the English language because you had a Senator that conducted investigations in a manner that none of us here would support. But a witness comes here really with very little if any protection. And I think that if we are going to strengthen the penalties—and we may be, I'm not disagreeing that we should or should not at this time—I think we should ought to look at the other side of the coin and make sure that there is an element of fairness in the questioning.

I just have one question, Senator Cohen. I too was a little concerned about that language about "inconsistent with the Findings."

Senator **Cohen**. Inconsistent with the law. Yes.

Senator **Roth**. Inconsistent with the law, the statutes. There are tons of statutes on the books dating from way back. One of my concerns is that when you say inconsistent with any statute a pretty clever lawyer can usually find some means or basis of showing that almost anything you do is inconsistent with one of these statutes.

I wonder if you could be more specific.

Senator **Cohen**. What I'm trying to address is a situation in which we have 2 policies. One policy for the public and one policy for private execution—for example, having a public policy of not trading arms or selling arms to a terrorist supporting nation. That was our public posture. We had Secretary Shultz going off to Europe in Operation Staunch. He was trying to lecture our European allies about not transferring weapons and helping the Iranians and other like-minded countries.

And then we had a covert activity which was totally inconsistent and violative of that. Also the notion that was at least predicated——

Senator **Roth**. Could I just point out this situation?

For example, we have friendly relations with the countries behind the Iron Curtain. Our Secretary of State is going over there trying to promote arms reductions and so forth.

At the same time, we could be having different kinds of covert actions with respect to those countries. Could you argue that that's inconsistent?

Senator **Cohen**. Well, I don't think carrying on diplomatic conversations by the Secretary of State would in any way violate a public posture. What I'm talking about is carrying out covert activity, something that is classified as a special activity, which in fact violates the terms of a law that has been passed in public, voted upon in public, signed by the President and yet is being violated by a covert activity.

Senator **Roth**. For example, we consistently pass resolutions of friendship with various countries——

Senator **Cohen**. That's a nonbinding resolution. That's not——

Senator **Roth**. Well, it depends on how it is worded.

I guess my concern is that the language is so broad that it needs to be made—I sympathize with the goal and the objective, but I think it is so broad that it just would make it very difficult to do almost—If you have a smart lawyer, I think you could find almost anything is inconsistent with some statute.

Senator **Cohen**. Well, I think we still have to deal with the issue of not having public laws that have been voted and debated upon in full view of our constituencies, signed by the President, and then having something undermine it.

Senator **Roth**. The language says any statute. And we have back dating to I suppose the beginning of the Republic.

Thank you, Mr. Chairman.

Chairman **Boren**. Thank you, Senator Roth.

Senator Hecht, any questions at this time?

Senator **Hecht**. Thank you, Mr. Chairman.

I would like just to take a couple of minutes and comment because we are having a public hearing. I will make my comments publicly.

I have reviewed all of these bills pending before us with my distinguished staff member, and I can say publicly I'm against all of them.

I think they pose a threat to our intelligence gathering apparatus worldwide. I don't think they are in the best interest of our country right now. I think they are an overreaction. And for the moment I would like to stand back and reflect a few moments before we go into any hasty legislation.

Chairman **Boren**. Well, thank you, Senator Hecht. I guess we will record you as an undecided on how to proceed here. But we appreciate that point of view and I agree we have to proceed with caution.

I think this committee, as I have indicated on several occasions, is very valuable because it does represent a broad spectrum of opinion. And we need to think about all of these perspectives as we do proceed.

Senator Cohen?

Senator **Cohen**. If I could, Mr. Chairman. I would point out that this legislation is quite consistent with what the President has already agreed to. So if the legislation is bad for our community, then we have to talk to the President. He's got a very bad policy in effect right now that is ruining our intelligence gathering capability worldwide. And I don't think that we would subscribe to that.

I'd like to offer just a few final comments. And if I can carry it further?

Senator **Hecht**. Come on. Go ahead and argue. I'm ready for you.

Senator **Cohen**. I would hope so. I would assume that the presence of this committee also is inconsistent with the best interests of the Agency's ability to collect information and carry out covert activities.

Would you argue that?

Senator **Hecht**. Well, first of all, let me say what you said before. I'm not sure the White House and administration is in favor of these particular pieces of legislation.

Senator **Cohen**. I didn't suggest that they were, Senator Hecht. What I suggested was that the legislation itself is not only consistent with what current policy is but it actually puts in legislation something that could be changed without notification to the Congress of the United States.

Senator **Hecht**. Well, someone just mentioned what a smart lawyer can do. Well, I'm not a smart lawyer. I'm not a lawyer at all. But I have been an agent. And I understand certain things you cannot ask your attorney before you do certain things. Certain things in the intelligence world you react. You're supposed to be intelligence. You're supposed to do certain things and you cannot always have legal advice at every moment.

And one of the reasons that we have had such a great intelligence organization is that we can do certain things. Now if you are going to handcuff our apparatus, and come in with comprehensive legislation that only a smart attorney will learn, yes it is going to hamper us all up and down the line. And I'm just not in favor of it.

Senator **Cohen**. Senator Hecht, I think you and I just have a fundamental disagreement that even agents have to act within the rule of law. And what this legislation and Presidential Directives and Executive documents are designed to do is to make sure that agents who carry out activities on behalf of this country also would adhere to the rule of law and not go beyond it.

But if I could just conclude, Mr. Chairman.

Senator Roth raised an important issue talking about not overreacting and citing procurement in particular in terms of our weapons systems. I would simply point out that we, back in the early part of this decade, became concerned about revelations that we were having too many sole source contracts. And so we did, in fact, insist upon some changes. That agitation coming from the Congress produced the so-called Carlucci Initiatives. And they have been helpful. And I think by stressing more competition, which I know that you are very much in favor of, we saved millions of dollars. We still have a very, very complicated procurement system. Nonetheless, we've made some substantial improvement by saving millions of dollars through that competition.

So it may take various exposures of activities to spur the Congress, which in turn has a very salutary and cleansing impact upon the Executive branch as well.

Second, I think we have to be concerned. I think your point is well taken. What we have to be concerned about is that we not build the notion that we are adversaries with the Executive branch—or certainly with our intelligence community—that we are all on the same side. And therefore I would prefer to try and stress cooperation with witnesses who come from the Agency or from the Executive itself to testify in a spirit of cooperation. We can't legislate that as I think Senator Specter has indicated. We can, perhaps by legislation, impose penalties but I want to consider that further. But basically what we want to do is take down the barriers. And say that we are part of this system. That we are part of the foreign policy making apparatus as well. That we do not have veto power but we do have words of insight and perhaps even wisdom to offer on occasion. And that's the kind of system I want to promote and I think this committee can.

Senator **Roth**. Mr. Chairman? If I just might make an observation because I agree with what Senator Cohen said. I think the responsibility of this committee and the Congress generally is to improve procedures so that we can do a better job and those responsible for the action.

Where I have concern is where we have a specific incident and we build all kinds of red tape to meet that incident. Which may or may not occur again. And I think that's where we've gotten some of the red tape for example in military procurement.

I'm just anxious that what we do improves our capability of oversight and just is not an angry reaction to a specific incident.

Senator **COHEN**. I agree.

Chairman **BOREN**. Thank you very much. Thank you, Senator Cohen.

I think that what we're all trying to do here is strike that balance that's being described. The balance between improving the procedures, making them clear to everyone concerned so that they are not misunderstandings by what we mean, for example, by terms like timely notice that have been ambiguous in statutes in the past.

I think our purpose is not to impose unnecessary red tape or additional rules and regulations on the process that are not needed. But instead to clearly spell out in a reasonable way the procedures that should be followed so that we can indeed be working partners. We've done a lot in this committee to try to work to rebuild the trust. We've done that with our own internal rules and restraints on the disclosure of classified information. Clamping down on access to classified documents and making it clear that members of this committee will be required to meet the highest responsibility of keeping secret those things which must be kept secret for the sake of our national security.

We have felt for the most part that those within the administration charged with the responsibility in the intelligence community have been moving to meet us half way to re-establish this relationship of candor. And then I think we also realize looking back on the Iran experience that it is not just a matter of the rules, the regulations and the procedures. We had pages and pages and pages of rules. We had letters of understanding between the committee and the Agency involved, the provisions of which simply were not followed.

We realize that, in addition to clarifying the procedures which we are appropriately talking about today and which should be clarified and should be strengthened, we must also do our job of actual oversight. Very often the Congress does more legislating than it does overseeing. And I think we have to keep that in perspective today. The hard work that has been going on behind the scenes in our committee has been aimed at not only legislating and looking at improving procedures but also improving our own ability to provide oversight. To be systematic. To look at each and every program. To make sure they are still needed. To make sure that intelligence analysis is objective. To move forward with the auditing capability that Senator Glenn and others have been talking about for some time.

And I think we can strike the appropriate balance, proving that we are responsibile, re-establishing that relationship of candor and trust, being very efficient and effective and systematic in our actual oversight and then clarifying the rules and procedures under which we are operating. You are attempting to do this with this very valuable legislation. We will end up with a balanced approach and give our intelligence community the flexibility to operate. We'll also protect the professionals in the intelligence community themselves from undue political influence or from being pushed into doing things that they themselves do not wish to do.

It's a protection for the Agency as well as the intelligence community. And it will certainly provide additional support for their budgetary and other needs. So I'd like to view the oversight process in a very positive way with a sense of establishing this kind of partnership that's better for all of us and for the country.

Senator **Cohen**. I now know why you're a cosponsor of the bill.

Chairman Boren. Thank you very much, Senator Cohen.

We're very pleased to hear now, and we will all try to restrain ourselves within the time constraints, from the distinguished Chairman of the Committee on Governmental Affairs, Senator John Glenn of Ohio. Let me thank you, Senator Glenn, for being patient with us as we conducted some discussion and debate among ourselves.

But I think you'd agree with me that it's very healthy when proposals like that of Senator Cohen and the proposal that you and others are advancing today spark this kind of serious consideration. There is a thoughtful balance of opinion on this committee. The various perspectives are represented and that is as it should be. It should be reassuring to the American people that we are taking these matters very, very seriously.

We appreciate the good working relationship that we have with your committee. Very often there are common areas of concern. As you know, we have crossover membership between your committee and this committee which is very helpful to us. Frequently, Senator Roth, for example as a member of your committee, brings the concerns that have been expressed within the Governmental Affairs Committee to our attention.

I think your proposal on auditing capability has already had a positive impact. It has led us to serious consideration of our own internal procedures as I've indicated and in some moves already to strengthen those procedures.

We're very glad to have you with us this morning.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **Glenn**. Thank you, Mr. Chairman.

I do sincerely appreciate your inviting me to share my views with you. I was interested in Senator Hecht's comment. I see he's preparing to leave here.

Senator **Hecht**. I gave Bill my cushion. So if you can't see me——

Senator **Glenn**. I come at somewhat of a disadvantage, I might add, because Senator Cohen, I almost flunked high school Latin.

Let me just reply seriously to this. I want the strongest kind of intelligence operation. That in effect is a force multiplier for us. If we know what's going on in the world, we can make the best use of our military forces if they are needed.

I see any good long-term intelligence program as one that has the long-term support of the American people as reflected by Congress.

As the Chairman pointed out in this morning's hearing, the Iran-Contra affair shook up the American people. There were activities going on out there which we never thought were possible in this day and age. In effect, we had a separate foreign policy being run as a covert operation, including the transfer of arms.

On the Armed Services Committee that Senator Cohen and I both serve on, we thought we bought those arms for our domestic defense. We found those arms being transferred to other countries. And that shook up a lot of people and created the doubts in our system that have led Senators Cohen, Fowler, Specter, myself and others to be very concerned that we put into place protections so that a similar event can never occur again. Had the Iran-Contra covert operation continued, American foreign policy would have been quite opposite from what our internationally stated foreign policy was. I want to make the strongest kind of intelligence operation because it is necessary for this country. And that's the only reason that I got into this.

The legislation that I have proposed, Mr. Chairman, would allow the General Accounting Office to audit the books and records of the CIA but with protections. These protections would prevent the audit from endangering any CIA operations. And I believe the bill strikes the appropriate balance between the need for greater professional accountability in the oversight of the CIA activities while protecting the confidential and secure operations of the CIA. We carefully limit the manner by which the GAO would obtain access to CIA personnel and records. We also limit the dissemination of any audit results to the Senate and House Intelligence Committees. A principal duty of GAO is to make independent audits of agency operations and programs and to report to the Congress on the manner in which federal departments and agencies carry out their responsibilities. In establishing GAO, Congress recognized the office would require access to the records of the federal agencies. And this need cannot be fulfilled if GAO's access to records information and documents pertaining to the subject matter of auditor review is severely limited. This legislation is intended to strengthen GAO's ability to discharge its functions as an investigation and auditing arm of Congress. Congress relies on GAO to see that funds are used for their intended purposes, and that agency programs are achieving the objectives set forth by law.

And before discussing the specific provisions of the bill, it may be helpful to set forth why I believe it is essential to have both a strong intelligence capability and better independent audits of that function. I believe the country needs a very strong independent but accountable CIA. Congress and the American people have supported CIA with our treasure, and even more important with sweeping powers and authority to complete the CIA's mission.

I do not believe the CIA's mission will be compromised by the bill I have proposed, S. 1458, which would permit a prudent, a circumspect, and a professional review of CIA activities. I recognize the legitimate concerns for tight security concerning CIA activities, particularly the sensitive business of collecting HUMINT, human intelligence information. And it is patently true that any outside audit will, inescapably, add some risk of compromise, however small, to the audited activities. But, the protection we have built in will limit the risk. And a few select programs will be exempted from the audits. Almost all of the CIA's budget can be audited without compromising security demands. I don't know the exact number of those activities CIA has that would involve the budget break down. But we know of the hundreds of millions of dollars spent on satellites and things like that. Those programs can certainly be audited without direct human danger.

The Congress has been faced with choices in the past. Because of CIA abuses of the character, we decided in the 1970's to require that the CIA desire for absolute secrecy give way to some amount of Congressional oversight by 2 select committees. And this compact between the intelligence community and these committees has been, on balance, evolving in the desired direction. I think it has been very good. The intelligence committees have provided policy guidance; they have checked the tendencies which exist whenever great power is provided to fallible men and women. I might parenthetically add that an unfair perception has been fostered against the Congressional oversight—be it from the committee or the GAO, based on the allegation that the Congress "leaks" intelligence information. I believe that Congress' record is, on the whole, one we can all be proud of, and is a credit to the past and present members of this committee.

Vigorous congressional oversight saved the CIA to a significant degree from the embarrassment and recent unconstitutional behavior of a secret government, which apparently included the CIA director, which acted with belated, nonexistent or plausibly deniable presidential authority; sold arms to a terrorist government in an effort to free hostages, diverted its profits to wars on another continent. Had S. 1458 been law, I think it is very possible that some aspect of this grand scheme might have come to the attention of this committee in time to stop it very early on or at the very least to have allowed for greater damage control. If some of the hidden $12 million which was discovered by the Iran-Contra congressoinal committees had been discovered sufficiently early, we could have tracked that, and stopped some of what was going on. The threat of independent audit might also have served as a very powerful deterrent to involvement of the Agency in any aspect of the Iran-Contra affair.

In any case, the Iran-Contra affair is evidence that we cannot be content with self policed internal reviews, alone. It is simply a fact that self-audit was not adequate in this case and it is justifiably subject to suspicion. In order to expedite such independent reviews, Congress established the GAO.

I believe that GAO audits performed under the watchful eye of the Intelligence Committee will supplement and assist the committee's efforts to ensure that Congress fulfills its oversight responsibilities over CIA and our other intelligence activities. The utility of using GAO to assist in this regard is demonstrated by the assistance GAO provided in establishing audit trails for the Select Committee reviewing the Secret Military Assistance to Iran and the Nicaraguan opposition.

In general it is very good public policy to have an independent audit—underline independent—of the expenditure and use of all public funds. Such reviews are an instrument to improve public trust and act as a deterrent against abuse by government employees. Exceptions to the requirement for independent audits must be based not only upon exceptional situations, but also on a broad acceptance by the public, and an understanding of the rationale behind any such exceptions. I do not see the need for, nor the public support for a complete exemption for the CIA, which is basically what we have now. And once we have put these things in place, we still provide ways for which the super secret, highest level operations that might endanger human life can be protected against a general policy of audit.

There is a strong public acceptance of the necessity to have powerful U.S. intelligence gathering and analytical capabilities, given that we do live in a dangerous world and I share that feeling. There is far less public acceptance or understanding, however, of other intelligence activities, particularly covert operations, that may not always comport with the image of the United States as a defender of international law and of democratic principles democratically arrived at. The most successful covert activities are those that, by definition and without acknowledgment, have been proposed, approved, planned, undertaken, completed, and closed, in support of established public policy, and without exposure in either the target country or domestically in the United States. Despite such successes, there has been sharp, and sometimes bitter controversy over CIA—and now NSC—activities that were begun covertly, but have become exposed to public scrutiny, particularly where the covert operation is inconsistent with the public policy espoused by our government. Nor are covert programs alone excepted from GAO review. No CIA activities are subject to independent audit review now. This was not always the case.

After enactment of the Central Intelligence Act of 1949, GAO continued to make site audits of vouchered expenditures—as it had done for the predecessor Central Intelligence Group. This work specifically excluded unvouchered expenditures and did not include substantive reviews of CIA policies, practices, or procedures.

In the mid 1950s, GAO began to expand its overall reviews, from auditing financial transactions to determining whether authorized programs were being conducted in an efficient, economical, and effective manner. This was also the case at CIA. In October 1959, the CIA director agreed that GAO would expand its audit activities, but a number of conditions were placed on GAO's access. The Comptroller General agreed to the conditions on a trial basis. In May 1961, after the trial period, the Comptroller General concluded that GAO did not have sufficient access to information to make comprehensive reviews and, as a result, GAO planned to discontinue audits of CIA activities. After much discussion and several exchanges of correspondence among GAO, CIA, and the cognizant congressional committees, GAO oversight ended.

In essence, the Central Intelligence Agency has never afforded GAO sufficient access to its records to permit comprehensive reviews of its programs and activities on a continuing basis that would be helpful to the Congress. With few exceptions, GAO has not conducted any audits at the CIA nor any audits which focus specifically on CIA activities since 1962.

Presently GAO access is generally limited by CIA to having discussions with its staff, arranged on a case-by-case basis. Usually these discussions are on matters that do not directly involve a CIA activity or in those areas which CIA does not consider too sensitive. For example, in recent years, CIA has been generally cooperative on GAO work related to international economics and trade regulations and to U.S. security assistance programs in foreign countries. In addition, GAO occasionally obtains access to classified intelligence reports and studies controlled by the CIA, though this is by no means routine.

The lack of outside audits for any CIA activities is also in marked contrast with procedures throughout this government. Every other agency and department is already subject to the audits of the GAO—including the National Security Agency (NSA), one of the most secret operations in all of our govenrment, and the nonpublic development efforts at the Department of Defense Programs requiring handling of highly classified national security information.

GAO has reviewed certain activities covered by the National Foreign Intelligence Program, including certain DIA activities, and by the Tactical Intelligence and Related Activities program, including such systems as the TR-1 and RF-4C Aircraft, Joint Tactical Fusion Program, and the Advanced Tactical Airborne Reconnaissance System.

GAO has also reviewed certain non-intelligence special access required programs, the ones we normally call "black" programs. Ongoing GAO work on non-intelligence special access programs includes examinations of the advanced technology bomber, advanced cruise missile, advanced tactical fighter, and advanced tactical aircraft.

Access to both the Intelligence and Non-intelligence Special Access required programs and activities are closely controlled by GAO. Specifically, access is limited to a very small number of people with proper security clearances.

The CIA is institutionally alone in its belief that GAO is not legally authorized to audit their activities. In the long run, I believe carefully controlled GAO audits of CIA will lower the probability of future abuses of power, boost the credibility of CIA management, increase the essential public support the Agency's mission deserves, assist the Congress in conducting meaningful oversight, and in no way compromise the CIA mission.

So I recognize and applaud this committee's decision to begin remedying the lack of independent audits at the CIA by planning to hire two auditors on the committee staff here. But, the committee's effectiveness in this area will be enhanced, I feel, many-fold by having the GAO available for such audits, with access to all GAO's resources, rather than merely depending on a talented, but very limited number of Senate staffers, to assist Congress in performing its oversight chores. At a minimum, GAO believes that 10 to 15 specially cleared auditors would be required to perform up to 5 major requests per year at CIA.

The committee staff has responsibility to you for the entire intelligence community, from the military services to CIA, and this requires coverage over a budget authority of many billions of dollars involving many activities and agencies. For these reasons I believe it is highly unlikely that a staff of two or three can provide adequate coverage over the CIA, in addition to all these other functions.

So I would respectfully suggest that if S. 1458 were enacted into law, this committee's auditors could monitor and supervise the limited but more numerous GAO personnel who would audit CIA on a routine or extraordinary basis.

The crucial public policy issue is centered on whether a perceived gain in public trust and successful congressional oversight outweighs any increased risk of disclosure. Once we accept the need for conducting some measure of independent, and not inhouse, review of CIA expenditures, the key question is whether GAO's reviews can be conducted in a manner consistent with the safety and security of the CIA's operations. I believe all the evidence indicates that can be done.

By existing law and specific language and this bill, GAO review power is carefully limited in at least 6 major ways to prevent damage to CIA operations. First, all GAO auditors must obtain appropriate security clearances from CIA before they are granted access to CIA information. Second, CIA records are to be kept at secure locations controlled by CIA. Third, any GAO documents created as a result of the audit will receive the same derivative security classification as the original document had. Fourth, existing law would allow for criminal prosecution for breaches of security. Fifth, and I believe of vital interest to this committee, is the significant limitation in congressional requests and dissemination.

Under S. 1458, the congressional request for a GAO audit must come from the Chairman or ranking minority member of the Select Committee on Intelligence of the Senate or the Permanent Select Committee on Intelligence of the House of Representatives. This will necessarily pose a significant limitation on the remainder of Congress, and emphasizes the central role of the Intelligence Committees in their area of oversight. If the GAO self-initiates an audit or review, the resulting report will only be shared with those committees and the Director of the CIA.

Sixth—and this is one of the most important parts of this I referred to earlier—the President will have the power to exempt any individual CIA Officer or employee from GAO access. These controls on the proposed GAO audit and dissemination process constitute an appropriate balance of the need to protect CIA security and the need to ensure adequate oversight. This will do something else. It would require the President to be the exempting officer. And that would mean that we never again could have a President who would say that he didn't know or had not been informed of a covert operation. This is especially important in light of the Iran-Contra affair.

Mr. Chairman, I appreciate the opportunity to discuss this measure with you. I look forward to answering any questions you may have and working with you as we move toward our common goal of making sure that some of the abuses that have occurred in the recent past are corrected; that we, as the people's representative, are kept informed, and that we set up a system of audit out of our collective efforts to improve control over the past.

Chairman **Boren**. Senator Glenn, I appreciate the comments you made. You have given us many good ideas to think about. You have made some excellent points today and obviously there's already a feeling on this committee that we need to have some sort of independent audit capability. That is why we already moved to create a very modest in-house capability which, of course, can at most merely spot check programs and not conduct large scale audit responsibilities.

I wonder about this. I note that while audit reports under your legislation would come back only to the intelligence committees, that the Comptroller General would also have the right, along with either the Chairman or Vice Chairman or the 2 intelligence committees, to initiate audits. I ask this question not out of any parochial or provincial point of view, I hope, because the reason why we have the two intelligence committees, of course, is try to constrain the number of people that have information about highly classified programs so we can minimize the possibility of unnecessary disclosure of that information.

I'm wondering if it wouldn't be better simply to leave it only with the 2 intelligence committees with our own in house auditing capability. We may uncover areas where we think additional help or additional resources are necessary to really, in an meaningful way, go more broadly into the auditing of a program. But rather than having the Comptroller General be able to initiate it if he sees the need, shouldn't the Comptroller General come to the intelligence committees and say I urge you to initiate an audit or I feel that there is a need for an audit of a certain area. And concerning procedures under which the auditing should be carried out, I wonder if it also wouldn't be appropriate to require that those procedures be approved by the intelligence committees. Since we are charged with this special responsibility of making certain that the classified information is safeguarded, I wonder how you would feel about those two changes. If the Comptroller General came forward and said we feel there is a real need to look at a certain program, I can't imagine a responsible intelligence committee saying no, we don't want to uncover the facts, if there was a real cause brought to us either by the Comptroller, or by any other committee, or by members, or non-members of the committees themselves. But I wonder if that would be an added protection that at least the initiation of an audit and the procedures under which it would be conducted would have to be approved by the committees.

Senator **Glenn**. The self initiation feature that we have in here is worthy because, I believe that a very, very high percentage of the CIA budget can be audited without endangering anyone's life. In that process of analysis, if we can come up with large discrepancies in the budget in different accounts, then we will have a firm basis to initiate investigations. I think only a general auditing ability would discover hidden programs. That reason is why we thought it was important.

If GAO were to come to you only with specific requests, they'd be, in effect, shooting in the dark unless they had an overall picture of what the audit trail was at CIA. Otherwise, they wouldn't know what to ask you to look at, unless they came by some other bit of information. Let us take a hypothetical situation. GAO is tracking a general audit picture and all at once $12 million shows up. They say, OK, we want to track down the 12 million dollars down here, what happened, and, the Director at CIA says, I can't tell you that; it's a classified program beyond even your audit. The DCI will have to go to the President and ask him to exempt the program. The President, alone, can authorize that. Then the President would have to know what the program is. And that to me seem to be a logical way to go. I know the self-initiation is a very controversial part and I am quite happy to discuss this with you. Maybe there is some arrangement we can make that wouldn't be quite this inclusive.

Chairman **Boren**. From the standpoint of protection of sensitive information, what is your opinion concerning stronger language in the bill to address the procedures to be used by GAO in auditing the CIA? I think you have language in the bill about consultation with the intelligence committees about establishing procedures. What about strengthening that to require the approval of the intelligence committees of procedures before audits commence?

Senator **Glenn**. Page 3 of the bill, on part D(1), down line 16, after, "consultation with the Select Committee on Intelligence of the Senate and Permanent Select Committee on Intelligence of the House of Representatives, the Comptroller General shall establish procedures to protect from unauthorized personnel all classified and other sensitive information furnished to the Comptroller General or his representatives under this section."

Chairman **Boren**. Right.

Senator **Glenn**. So that would place it under your aegis here.

Chairman **Boren**. It would require consultation but it would not require our approval. In other words, as I read this, the Comptroller General would consult, but then he would go forward after consulting about procedures.

Senator **Glenn**. Well, maybe this is something we have to work out here.

Chairman **Boren**. It would seem to me that it would strengthen it from our point of view of making certain that we had teeth in it if we felt that they were embarking on some procedure that we felt was improper if they had to have us to actually approve the procedures before they commenced operations.

Senator **Glenn**. You mean you want to have prior approval of any investigation?

Chairman **Boren**. Well, there are two separate points. I suppose one would be an investigation, the other would be the procedures that would be followed. So they would be separate. In other words, if you were going to conduct a general audit of certain functions—lets say acquisition of parts on technical systems—you might audit that general area. But the procedures to be followed in making any kind of audit, setting aside the question whether it could be self initiated or not, it would seem to me it would be important to have the committee approval not just consultation. We have had experience with consultation; i.e., sometimes come in and say well, I consulted with you for 5 minutes and then I went ahead and did what I pleased.

Senator GLENN. You would like more discretion——

Chairman BOREN. That's right.

Senator GLENN. You can do that if you want to do it.

Chairman BOREN. If you want to do it. But we would set up the procedures under which they would operate including, perhaps, notification back to us by the agency if they were treading into an area where the agency was asserting some sort of privilege where we would decide whether or not to proceed.

Senator GLENN. One of the reasons that we set this up on a GAO initiated-basis was because in the bill we also limit the rights of individual members then to ask GAO to do things, which right now any member has the right to do.

Chairman BOREN. Right.

Senator GLENN. And so we limit that right and at the same time then say that they can self initiate on their broad look at this thing. But we give the President—I repeat, we give the President the right to say, OK, here are people that are off limits and you can't do this and I have certified this and GAO, that's it. Now, the President would give you notification here that he has exempted a certain thing. Now you may choose to look in to that further at a private briefing or you may not. You may accept his word that this something even you might not want to know about it here but, that would be up to you and the ranking minority member.

Chairman BOREN. Well, you have certainly give us many points to ponder and great deal of thought has gone into this proposal. I certainly think this merits further consideration by us. As I have said, you have already focused our attention upon this area and I appreciate that very much.

Senator GLENN. Well, I think you moved expeditiously and I compliment you for that. I don't see that as being competitive; I think it is great the way we are doing this already.

Chairman BOREN. Oh, absolutely.

Senator GLENN. I just see the GAO as being a very valuable adjunct to the people that you are going to have on the committee here. You have a whole herd of intelligence things to try and deal with. You have CIA, you have a number of other things—we are always talking about CIA, but you have a number of other intelligence things too that you get into.

Chairman BOREN. Absolutely.

Senator GLENN. So, your staff here can correlate these activities and use GAO as a very valuable tool.

One other thing I might add. One reason I think GAO is so good on this is because they are trained in this area, and they have to keep updated on brand new accounting procedures and investigative procedures. They are required, I believe, to do something like 80 hours of continuing education each over a 2 year period. They are thoroughly trained, and their people are accustomed to go into agencies and know where and how to look. Now I repeat again, I don't want to endanger any classified information out there; I want to build every protection we can; but I think that probably 95% of the budget out there can be audited without any danger whatsoever.

Chairman **Boren**. You make a very good point and, of course, we have not only our responsibility in the areas of covert action, the kinds of areas which get headlines very often, but we also have the day-to-day budgetary responsibility to oversee the expenditure of large amounts of money, as you have indicated, to make certain that those funds are being spent wisely, strictly from a business efficiency point of view. I think what you say is certainly true. There's no inconsistency at all between the preliminary steps that we are taking and consideration of further steps that can be taken down the line as you suggested.

Senator **Glenn**. I would ask a letter from the Comptroller General be placed in the record also.

Chairman **Boren**. Without objection it will be.

[The letter referred to follows:]

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, DC, November 12, 1987.

Hon. JOHN GLENN,
Chairman, Senate Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Tomorrow you are to testify before the Senate Intelligence Committee on S. 1458, the General Accounting Office Central Intelligence Agency Audit Act of 1987—a bill you introduced to clarify GAO's authority to audit the CIA.

As you know, over the years GAO has been a reliable, objective source of information in support of Congress' oversight of the activities of Executive Branch agencies. The one major exception has been CIA activities. GAO has been unsuccessful at the CIA in gaining the access we need to effectively audit the activities of that agency. As I testified before you in February, I believe that we need to improve accountability and oversight of sensitive government activities. I can assure you that GAO stands ready to carry out this responsibility should your bill be enacted.

Sincerely yours,

CHARLES A. BOWSHER,
Comptroller General
of the United States.

Chairman **Boren**. Senator Cohen, any questions.

Senator **Cohen**. No, Mr. Chairman. You read from the list of questions I had very well.

Chairman **Boren**. You are not supposed to expose that information, Mr. Vice Chairman.

Thank you very much, Senator Glenn, for your testimony.

We will now hear from a member of our own committee, Senator Specter, who has introduced comprehensive legislation, Senate Bill 1818. Senator Specter, we are very pleased to hear from you at this time and have you outline for the committee the major provisions of the legislation which you have introduced.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator **Specter**. Thank you very much, Mr. Chairman.

At the outset I commend you for holding these early hearings and I commend you and Senator Cohen for the outstanding work you are doing as the leaders of the Intelligence Committee.

Mr. Chairman I would ask unanimous consent that the full copies of my floor statements on S. 1818 and 1820 be included in the record at this point and then I will abbreviate my testimony accordingly.

Chairman **Boren**. Without objection, the full statements will be included on both bills.

Senator **Specter**. Mr. Chairman, I concur with what our colleague Senator Hecht had commented on earlier, and that is, the need for strong intelligence operations. Senator Hecht was an Intelligence Officer back in 1951 through 1953. During that same interval I was in the Office of Special Investigations of the United States Air Force and had some experience with intelligence operations as well, although OSI was largely an investigative operation. But, I have a very high regard for the necessity for gathering intelligence, for fact finding. If we know what the facts are, we are in a position to act prudently. So I think we have to be strong on intelligence. And I concur with what Senator Roth has said about no undue reactions. However, I believe that some legislative initiative are indispensable at this juncture in response to what we know to be major problem areas in the intelligence operations in accordance with congressional responsibilities on oversight.

When this intelligence committee met on Saturday, June 27, we addressed a number of issues which are the subject of discussion today. I believe that the letter, prepared as a result of that session and was sent by the Chairman and Vice Chairman on July 1st, was an important letter. I then circulated drafts of legislation on August 7 and introduced that legislation in October as a preliminary to the testimony which I am giving here today.

Mr. Chairman my proposed legislation essentially covers 4 areas. One is on the notice requirement. A second is on internal checks within the CIA itself. A third is our efforts to get at the truth. And a fourth relates to certain fundamental restructuring.

The notice requirement I think is of vital importance and I concur with what Senator Cohen has proposed. I think his legislation is exemplary. His differs from mine in certain minor respects. I like a shorter period—24 hours—but I wouldn't quarrel about 48 hours. I like contemporaneous notification, but I do believe we have to have notice. If there are extraordinary circumstances, it should be limited perhaps to the key 8 people—the Chairman, the Vice Chairman of the 2 House Intelligence Committees and the leadership in the Congress.

But I believe that there has been a glaring weakness in our foreign policy formulation structure with the second and secretive foreign policy illustrated by the sales of arms to Iran. I think it has to be corrected and I do not think it would be an undue reaction to take steps to do so. If we do not take these steps, I think we will be derelict in our duties. If there is to be no oversight, let's say so. But if there is going to be meaningful oversight, then we have to be notified.

Mr. Chairman, I was distressed with the response that came from the President to our letter of July 1, 1987, because of the provision in paragraph 6—and his letter I am told is dated August 7—in which he agrees to the 48 hours notice but he adds this exception, "in all but the most exceptional circumstances timely notification to Congress," etc., "will be given." In my view, that puts the intelligence committees in a worse position than we were before we wrote the letter of July 1st, in my opinion, because the statute requires timely notice. Now we have a Presidential statement that we will be notified in, "all but the most exceptional circumstances." Who is to determine that "exceptional circumstance."

Senator **Cohen**. If I can interrupt here the administration interprets the timely notice to mean that notice can be delayed for 15, 18 months, possibly even 2 years, as long as it took to carry out a covert action. So under the existing law we are not worse off, because of the way they were interpreting it to begin with.

Senator **Specter**. I would suggest Senator Cohen, that we are worse off because when they interpreted it for 14 months or longer under a statute which provided for, quote, "timely" unquote, notice; they were wrong. And I think we have a statute base for a very strong complaint. But, in the context where the President has said to the intelligence committees in our effort to tighten it up, that notice will be given in all but exceptional circumstances to be defined by the Executive, then we are on notice that they aren't going to tell us in a timely fashion if there are exceptional circumstances. So what may have been a de facto policy of the administration is now de jure. They have put us on notice and we can't expect anything more. At least before there was outrage; now there is understanding. So I will say we are further back than we were before. I would hope our committee will respond in a formal way to say that we do not acknowledge "exceptional circumstances."

The President has a Constitutional argument. I understand that. We cannot affect that by this legislation. But, I don't think we ought to sit back and say we acknowledge exceptional circumstances which is a limitation of existing statute. I think we will have to deal with that issue.

Perhaps, the truth is, and perhaps the best policy is, we shouldn't have effective oversight. The sale of arms to Iran proved that we don't have oversight. If we are to be left to an exceptional circumstances test, then we don't have oversight at all except under those circumstances where the Executive Branch chooses to allow it. That's not the posture of Congress and that's not the public policy of the United States. The legislation was passed in accordance with law. It was passed—I don't believe it was passed over a veto; I believe it was passed with the Presidential signature—so that's the law of the land. The exceptional circumstances, I think, weakens it very materially.

My legislation also provides, for an internal check through an independent Inspector General. My statement details the ineffectiveness of the current Inspector General system. There are eighteen branches of government which now have independent Inspectors General. The arguments made by Senator Glenn are perfectly applicable here. I think it is sounder to keep inspections within the intelligence community and within the intelligence committee. An independent Inspector General would achieve a significant improvement. There are exceptions where the independent Inspector General cannot go into sensitive investigations if the Director of Central Intelligence stops him. In such cases, there has to be notice to this committee. The independent Inspector General has worked very well in many lines and it ought to be adopted for the CIA.

The issue of truth that Senator Cohen and I discussed briefly I think is the basis on which we must operate. Without it, there can be no oversight. There have been instances—Senator Cohen acknowledges them and we all are aware of them—where we have not been told the truth. It is important to our oversight function that we know the truth. And again, I repeat, I don't want to punish anybody and I don't want to carry out the standard of criminal justice for vindication of any societal rights. I am not interested in deterring anybody except as that may relate to what they do when they come before this Committee again.

The objective is, simply stated, to see to it that we can carry out our function. We have been in these hearings where Perry Mason couldn't get the truth out of—in fact Senator Cohen couldn't get the truth out of some of the witnesses, even Senator Boren. We go round and round and round. And it isn't a matter in which we once thought of asking the right question. We have asked the right questions and gotten the wrong answers. I think we have to put some teeth into the law.

There is a statute at the present time—18 U.S. Code Section 1001—which makes it a criminal offense to give a false official statement. I believe that covers testimony before this committee. But, I think it ought to be tougher. Whether this provision is passed or not, it is a very salutary thing to propose, because people start to get nervous. I don't want people to be nervous without justification, but I don't want people to give false statements before this committee.

I won't elaborate on it now. We will be talking about it more in mark up. I believe this is a very, very important point. And we have recognized the importance of mandatory sentences where the values are high enough. When Senator Roth talks about a bill of rights, well, I think we have a pretty good Bill of Rights now. The Bill of Rights applies to witnesses before this committee. Any witness who wants to defer an answer would be given this privilege by this committee. Nobody has to answer anybody's question unless there is a subpoena, there is an order to answer or there has been a contempt citation and its been upheld on appeal. That's the only time when anyone has to answer any questions. If any witness appeared before our Intelligence Committee and said I would prefer to defer an answer for a few days since I would prefer to consult with my superiors, I would prefer to think about it, I would prefer to give it you off the record or I would prefer to give it to the Chairman or Vice Chairman only, we would accommodate that request.

The bill also allows a 5 day recantation period, so if a witness says something that might be construed to be willful—it has to be willful to be a violation of the criminal law—he can come back in 5 days and he can purge himself and avoid the criminal penalty.

Finally, two sentences on S. 1820 which is not before the committee, but I do want to mention it. Mr. Chairman, Senator Cohen I think we ought to move to separate the intelligence function from policy making functions. Secretary of State Shultz testified before the Select Committees about the problems that the Iran affair showed where the Director of Central Intelligence gathered the intelligence and cooked it to conform to what he wanted to achieve in policy.

I won't amplify it now because it is late and not the order of the day. I am up to 12 minutes and I wanted to be relatively brief. I think we ought to give some very serious thought to this. It was proposed in 1976. It is not an new idea of mine. It was considered in the Carter administration. It was part of the Republican Committee policy in 1980 an it goes to something which is very fundamtental to ensure the integrity of intelligence gathering as distinguished from policy execution.

I thank the Committee.

[Floor remarks by Senator Specter follows:]

STATEMENT OF SENATOR SPECTER ON S. 1818, THE NATIONAL SECURITY REFORM ACT OF 1987

S. 1818. A bill to make requirements for the preparation, and transmittal to the Congress, of Presidential findings for certain intelligence operations; to provide mandatory penalties for deceiving Congress; and to establish an Independent Inspector General for the CIA; to the Select Committee on Intelligence.

NATIONAL SECURITY REFORM ACT

Mr. SPECTER. Mr. President, hearings before the Senate Intelligency Committee and joint hearings before the Select Senate and House Committees on the Iran/Contra matter have demonstrated the need for significant action in order to establish the appropriate role for congressional oversight pursuant to the checks and balances contemplated by the U.S. Constitution. Notwithstanding any action which may be taken by the President by way of Executive order on this issue, legislative change is necessary to impose statutory requirements governing this or future administrations where any such Executive orders might be countermanded.

This bill has four goals:

First, to encourage timely consultation with key Members of Congress to obtain the benefit of their insights to avoid future blunders like the transaction with Iran on arms for hostages;

Second, to provide for effective congressional oversight by specific statutory requirements establishing precise time limits for notice where the President decides not to consult in advance;

Third, to establish mandatory penalties where executive branch officials make false statements to congressional committees; and

Fourth, to add an Inspector General for the Central Intelligence Agency to help assure lawful internal compliance on matters which do not come within the purview of congressional oversight.

SECTION 2

Notwithstanding the obvious failure of the executive branch to provide requisite information to Congress under the provisions of existing statutes, some have argued that there was compliance because of the vagaries of current law. In order to prevent a repetition of such conduct, the National Security Act of 1947 (50 U.S.C. 413) and section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422), known as the Hughes-Ryan amendment, are made more specific by this bill. Existing law prohibits the expenditure of funds by the Central Intelligence Agency for covert activities "unless and until the President finds that each such operation is important to the national security of the United States." Efforts have been made to justify the CIA's action in the Iran/Contra matter by contentions that an oral finding was sufficient and that a later written finding could retroactively justify earlier covert action.

This bill unequivocally requires that the finding be in writing and that the President shall give notice and a copy of any finding to the House and Senate Intelligence Committees contemporaneously with the finding, but in no event later than 24 hours after it is made. A limited exception is provided for an oral finding in situations where the President deems that immediate action by the United States is required to deal with the emergency situation affecting vital national interests and time does not permit the preparation of a written finding. In that event, the finding must be immediately reduced to writing after the action is orally approved, with the written finding to be completed no later than 24 hours after the making of the oral finding.

Where an oral finding is used, there is the additional requirement that the written finding shall include a statement of the reasons of the President for having first proceeded with an oral finding. This bill further provides that a finding shall be effective only with respect to operations beginning after the finding was made by the

President in order to preclude any contention that the finding may retroactively cover prior CIA operations.

These statutory requirements leave no room for doubt that no covert action may be undertaken without complying with the requirements of a written finding and the requisite notice, by any personnel of the executive branch or anyone acting on its behalf including foreign governments or any individual. This specific provision would preclude any future argument that the delivery of arms to Iran was legally justified, after the fact, by a retroactive finding or that other entities or actors were not bound by the same limitations affecting the CIA.

This bill further removes any possible ambiguity in section 501(b) of the President's obligation to notify the House and Senate Intelligence Committees of covert action. Section 501(b) now provides:

> (b) The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

The phrase "for which prior notice was not given under subsection (a)" carries the direct implication that the House and Senate Intelligence Committees should have been "fully and currently informed" of covert activities which are covered by section 501(b). It is obvious that the President did not comply with section 501(b) to inform the Intelligence Committees in a "timely fashion" where some 14 months elapsed from the time of the first covert action on the Iranian arms sales to the time that information reached the Intelligence Committees. Yet, some have contended that the exigencies of the situation excused the President from giving earlier notice so that requirements of a "timely fashion" were observed.

This bill removes any room for such future arguments by requiring the President to give notice to the Intelligence Committees contemporaneously with any written or oral finding. In order to remove any conceivable ambiquity as to the meaning of "contemporaneously," a time certain is added requiring the information to be transmitted no later than 24 hours after the making of an oral or written finding. Absent the experience of the Iran/Contra matter, it would seem unnecessary to put a 24-hour limitation after the requirement of "contemporaneously," but the recent experience that a time certain be affixed so that no one can later claim that "contemporaneously" means days, weeks, months, or even years later.

The requirement that the President shall contemporaneously inform the Intelligence Committees is intended to provide a procedure where the Intelligence Commitees might be consulted in advance so that the President would have the benefit of their thinking if he so chose. The language of section 501(a)(1) to keep the Intelligence Committees "fully and currently informed of all intelligence activities" suggests a design for congressional input. Even with such contemporaneous information and the possibility of congressional input, it would remain within the President's power to proceed or not as he chooses.

There is much to recommend the availability of the institutional experience of the Senate and House Intelligence Committees. Had there been a reveiw by the Intelligence Committees of the sale of arms to Iran, it is likely that the policy would never have been implemented. Had members of the Senate and House Intelligence Committees joined the Secretary of State and the Secretary of Defense and others in discouraging Presidential action in selling arms to Iran, the President might will have ceased and desisted on his own. Had the President declined to terminate that disastrous policy, then the Congress might have utilized its power to terminate funding through its appropriations powers, thereby ending the sale of arms to Iran.

The President's obligations on congressional oversight are further limited by excluding notice to the Intelligence Committees where the President determines that it is essential to limit such disclosure to meet extraordinary circumstances affecting the vital interests of the United States. In that even, such notice is to be given only to the chairman and ranking minority members of the Intelligence Committees, the Speaker and minority leader of the House of Representatives and the majority and minority leaders of the Senate. That more limited disclosure give sufficient assurances of preservation of secrecy. A valid argument could be made that notice should go only to the leadership of both Houses in the interests of secrecy, but the greater familiarity of the chairman and vice-chairman of the Intelligence Committees warrants their being included.

SECTION 3

This bill further provides for a mandatory sentence of imprisonment for any officer or employee of the Unites States who provides false information to any committee or subcommittee of the Senate or House of Representatives. No matter how rigorous or exacting statutory requirements may be, the oversight function of Congress cannot be accomplished if executive branch officials present false or misleading testimony to the Congress.

This is especially a problem where some witnesses appear before the Intelligence Committees in a secret session. Where evidence is provided in a public session, there is an opportunity for others to learn of the false information and to come forward with the truth so that the congressional oversight committees can perform their functions. That is not possible where key executive officials appear in secret and provide false information to the Oversight Committees. Under those circumstances, the committees realistically have little or no opportunity to determine the truth.

While false official statements to such congressional committees are covered by section 1001 of the Criminal Code, (18 U.S.C. 1001), this kind of misconduct, either in secret or public session, is so serious that it warrants a mandatory jail sentence.

While there has been experience with witnesses who return to the committee to apologize for prior testimony, such apologies fall far short of correcting the enormous damage which has been done. Obviously, there is no way to know how much false, deceptive, or misleading evidence has been presented in secret where the truthful information has never come to the attention of the committees. This mandatory jail sentence is intended to put members of the executive branch on notice that the matter is extremely seriously reflected by the heavy penalty.

It is obviously well within the ambit for any witness who appears before a congressional committee to decline to answer any question until that witness has had an opportunity to reflect on the question or to consult with his or her superior. Simply stated, it is understandable if a witness declines to answer or asks for a delay, but it is intolerable for false or deceptive answers to be made. The committee would doubtless consider not insisting on an answer where some reason was advanced for nondisclosure. Where any witness chooses to decline to answer a question, there is always an opportunity for further consideration by both the witness and the committee.

In any event, an enforceable legal obligation to answer does not arise as a practical matter until citation for contempt of Congress is obtained and the court orders an answer. If is only at this point that a witness is subject to a sanction for contempt for failing to answer.

This bill further provides that anyone who gives such false or deceptive information may recant and avoid possible criminal liability by correcting the record within 5 days. This 5-day period should be ample time for rethinking the issue and time to make the appropriate correction.

SECTION 4

The Inspector General Act of 1978, Public Law 95-452, established independent Presidentially-appointed and Senate confirmed IG's in 19 Federal departments and agencies. The creation of these statutory IG's has improved the effectiveness of the Federal Government. The act also ensures that both the Congress and agency heads are receiving independent assessments of programs and operations for which they are accountable or have oversight responsibility. However, the CIA was not included.

Currently, the Inspector General for CIA is usually appointed internally. That process is not conductive to objectivity.

The Intelligence Committee has had access to some IG reports in past years, but for the most part, it has not exercised oversight over the intelligence community's IG's. That has been a responsibility of the Intelligence Oversight Board. The Iran-Contra investigations have raised serious questions about the effectiveness of that body. The Tower Commission found that (III-22): "Lieutenant Colonel North and Vice Admiral Poindexter received legal advice from the President's Intelligence Oversight Board that the restriction on lethal assistance to the Contras did not cover the NSC staff." In addition, review of Executive Order 12334, which establishes the Intelligence Oversight Board, and the operations of the Board itself reveal that the Board is not adequately staffed, that the quality of its legal counsel has been demonstrated to be less than thorough and experienced, and, finally, that its effectiveness is not held in high regard by the Intelligence Committees.

This bill would greatly increase the independence and credibility of the CIA's Inspector General by making the IG a permanent, statutory official subject to appointment by the President and confirmation by the Senate with limitations on grounds for dismissal. To increase accountability to Congress, semiannual and special reports by the Inspector General must be promptly submitted to the Intelligence Committees, as well as to the Director of the CIA.

Secrecy is provided for, as is subpoena power. While the Director may halt an audit or investigation, he may do so only if:

First, it concerns an ongoing operation;

Second, he finds it vital to national security; and

Third, he reports to the Intelligence Committees within 7 days on the reasons.

The combined effect of an independent IG, mandatory penalties for deceiving Congress, and statutory requirements on notice to Congress on covert action along with written findings are therapeutic steps which should be taken in light of our experience from the Iran/Contra matter.

After the problems were publicly disclosed on the failure of the executive branch to notify the Intelligence Committees on the sale of arms to Iran, there was an exchange of correspondence between the President and the Senate Intelligence Committee. The President wrote to Chairman Boren by letter dated August 7, 1987, expressing his support for certain key concepts recommended by the Senate Intelligence Committee. Paragraph 6 of the President's letter stated:

In all but the most exceptional circumstances, timely notification to Congress under Section 501(b) of the National Security Act of 1947, as amended, will not be delayed beyond two working days of the initiation of a special activity.

In my judgment, where notice may not be given even in "the most exceptional circumstances" the fundamental requirement of notice is defeated because it remains with the purview of the President to determine what constitutes the "exceptional circumstances." Precise requirements are necessary as set forth in this proposed legislation.

STATEMENT BY SENATOR SPECTER ON S. 1820, THE NATIONAL INTELLEGENCE REORGANIZATION ACT OF 1987

S. 1820. A bill to improve the objectivity, reliability, coordination and timeliness of national foreign intelligence through a reorganization of positions, and for other purposes; to the Select Committee on Intelligence.

NATIONAL INTELLIGENCE REORGANIZATION ACT

Mr. SPECTER. Mr. President, the bill I am introducing today would enhance considerably the objectivity and reliability of our Nation's intelligence, which the events of the past 2 years have demonstrated to be woefully lacking. It would greatly improve the management structure and control of the activities and vast resources of our country's intelligence agencies and departments.

In his Iran-Contra testimony, Secretary of State George Shultz summarized, in very clear terms, the principal problem with U.S. intelligence. [One is] the importance of separating the function of gathering and analyzing intelligence from the function of developing and carrying out policy. If the two things are mixed together, it is too tempting to have your analysis and selection of information that's presented favor the policy that you're advocating. Secretary Shultz went on to say that, long before the Iran-Contra events came to light, he already had come to have grave doubts about the objectivity and reliability of some of the intelligence he was receiving precisely because the people who supplied it were too deeply involved in advocating and carrying out policy.

In the 40 years since passage of the National Security Act the Directors of Central Intelligence have been tested repeatedly on their ability to maintain a delicate separation of two competing responsibilities. On the one hand, the Director of Central Intelligence [DCI] has been expected to provide unvarnished intelligence information to the President and other foreign policymakers. On the other hand, he has been asked to be a participant in the making and execution of foreign policy through covert actions. If history has taught us anything, it is that the desired separation cannot and has not been maintained. It is unrealistic and probably unfair to expect our Nation's senior intelligence officer to be the purveyor of objective, unbiased information upon which the President and Secretary of State may formulate a foreign policy, while at the same time charging him to influence and implement that policy in the form of covert action.

The problem is particularly acute when the DCI is a foreign policy activist. Director William Casey was not the first Director of Central Intelligence who desired to be involved to some degree in the formulation or implementation of foreign policy, nor is he likely to be the last. Recognizing this, we should take steps to ensure, to the greatest degree possible, some structural separation of the DCI's current function. We simply cannot afford to have two Secretaries of State, two foreign policymakers who may be attempting to move the country in different directions, one overtly and the other covertly. No one is well served by this contradiction—not the President, not the Congress and not the country.

Now we have a choice, we can preserve the status quo and hope that the current Director of Central Intelligence—and each of his successors—will understand the lessons of the Iran-Contra affair. Or we can create a better system of checks and balances on covert action undertaking. It is up to the Congress to clarify in the law what we expect the Director of Central Intelligence and the CIA to do and not to do. We can do this by providing an organizational framework designed to permit the Director of Central Intelligence to provide objective, reliable and coordinated intelligence to policymakers in a timely manner. However, we must make it clear to the Director—not simply the current one but to all future ones—that it is not the DCI's function to formulate and implement foreign policy.

This bill accomplished these purposes by:

First, amending the National Security Act of 1947 to make clear that the principal role of foreign intelligence and of the agencies who provide such intelligence is to ensure the provision of objective, reliable, coordinated and timely information upon which the President and other senior foreign policymakers may base sound foreign policy decisions;

Second, relieving the Director of Central Intelligence of the responsibility for implementing covert actions, but charging him with responsibility for overseeing the conformity of such actions with applicable laws and regulations;

Third, establishing the position of "Director of the Central Intelligence Agency" to manage the CIA on a full time basis and to implement covert actions directed by the President.

As I already have stated, this bill will greatly enhance the management of the activities and vast resources of our several intelligence departments and agencies. In 1947, President Truman, mindful of the President's need for intelligence and of Pearl Harbor's bitter lesson stemming from uncoordinated and poorly disseminated intelligence, formed an agency to centralize intelligence. The position of Director of Central Intelligence was created to head the new Central Intelligence Agency and to coordinate the activities of the intelligence entities in existence. Those entities consisted of the intelligence services of the Army and Navy, a small bureau in the State Department and remnants of the OSS. Since 1947, that coordination task has grown enormously with the addition of complex technology, the commitment of vast resources and the establishment of many large, secretive and organizationally complex departments and agencies.

Since John F. Kennedy, several Presidents have directed their Director of Central Intelligence to devote the bulk of their time to the intelligence community. For a number of reasons this has not happened. Suffice it to say that, in some cases, DCI's have found the operational role of the CIA more glamorous than managing an intelligence community composed of agencies and departments opposed to centralized direction. Events such as Watergate, congressional investigations of wrongdoings, and the turnover of DCI's, also have contributed to the neglect.

Today, the intelligence community, as it is called, consists of the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, the large foreign intelligence and counterintelligence elements of the Army, Navy, Air Force and Marine Corps, offices for the collection of specialized intelligence through reconnaissance, the FBI's Foreign Counterintelligence Division, the State Department's Bureau of Intelligence and Research and elements of the Treasury and Energy Departments. These organizations provide what we call national foreign intelligence. There are other elements in the Government, mostly within the Defense Department, which run a vast system to tactical intelligence nearly as complex and as expensive as that of the national foreign intelligence world. Outside of the Government, there is another world of contractors who design and develop these complex intelligence systems and, in some cases, operate them for the intelligence agencies.

Make no mistake about my remarks. These agencies and programs are critical to our national security. The country needs them. But their budgets are in the billions; their growth in terms of people is the greatest in the history of U.S. intelligence; their mission and challenges now and for the foreseeable future are so demanding, complex and interdependent that their management and leadership can no longer be accomplished by a Director of Central Intelligence who also must mangage a large agency such as the CIA.

The Intelligence Oversight Committees which review the programs and budgets of the intelligence community have clearly identified management of the intelligence community as a critical issue. In 1976, the Select Committee to study Government operations with respect to intelligence—the predecessor to the Senate Select Committee on Intelligence—"found concern that the function of DCI in his roles as intelligence community leader and principal intelligence adviser to the President is inconsistent with his responsibilities to manage one of the intelligence community agencies—the CIA." The committee also expressed concern that the DCI's new span of control—both the entire intelligence community and the entire CIA—may be too great for him to exercise effective detailed supervision of clandestine activities. Those concerns are even greater today than they were 11 years ago, because of the greater challenges and costs facing intelligence, the growing competition for resources and the unacceptable risks to U.S. foreign policy.

To address this problem, the bill I am introducing today also:

Changes the title of the "Director of Central Intelligence" to the "Director of National Intelligence" to reflect the new, more important status of this position (the title is not new; it was first proposed by the Senate Intelligence Committee in 1980);

Establishes the Director of National Intelligence as the primary adviser to the President on national foreign intelligence and as the full-time manager of the intelligence community with clearly defined statutory responsibilities and authorities for the foreign intelligence effort;

Makes the Director of National Intelligence a statutory member of the National Security Council to ensure that he is aware of emerging issues for which there is an intelligence need and to ensure that there is an objective intelligence base for national security and foreign policy decisions being contemplated;

Ensures that the position of the Director of National Intelligence as leader of the intelligence community is not a hollow one, by giving the position not only the statutory authority to approve and submit the intelligence community program, resources and budget, but also to task all intelligence collection and analytical resources;

Eliminates the need for a Director of the Intelligence Community staff since that 237 person staff plus other offices and personnel would report directly to the Director of National Intelligence.

Finally, I endorse completely Judge Webster's view, recently expressed to a group of reporters, that the CIA's directorship should not change every time a new President is elected. This gives rise to charges that the position has been politicized and that there is an inadequate institutional memory of lessons learned from the past. In the past 15 years there have been 7 heads of the CIA and only 2 of these were career intelligence officers. We cannot afford a generalized loss of confidence in the CIA's objectivity and reliability, because of the politicization of its analysis such as was expressed by Secretary of State Shultz, to ensure a more professional approach to intelligence activities and analysis, to reduce the risk of politicization and to protect against the dangers of an intelligence "czar," this bill also would:

Create a fixed, 7-year tenure for the Director of the Central Intelligence Agency.

Require that at least one of the positions of Director or Deputy Director of the Central Intelligence Agency be filled by a career intelligence officer from the Intelligence community.

I am not proposing that the Director of National Intelligence be tenured because I believe that the President should have the right to select individuals who are to serve as his primary advisers. I believe that with a separate and tenured Director of the CIA and with other intelligence agency heads not under the administrative control of the Director of National Intelligence (the Directors of the National Security Agency and the defense intelligence agencies are appointed by the Secretary of Defense), we would have a better system of checks and balances against politicization of intelligence.

Thank you, Mr. President.

Chairman **Boren**. Thank you very much, Senator Specter. I assure you while we are moving on the procedural proposals at this time and hope to have a very early mark up on those, that we will also give very thorough consideration to your proposals for the reorganization of functions within the intelligence community. As you said, this is an issue that has been on the table now for some years. It merits very thorough consideration and it certainly will be given that by the committee.

Senator Cohen, any questions of Senator Specter?

Senator COHEN. Just a couple of observations. I tend to agree with Senator Specter about the Bill of Rights. I have never seen a witness abused or misused in any one of our hearings. It has never been a case of a witness being badgered and frankly, I don't know that we need any more protection than we currently have for a witness to be coming before the committee and be called upon to answer questions by members.

Second, I tend to agree with you about the President's letter, which is the reason I introduced the legislation. I was not satisfied with the provisions of the letter. That is about as far as the administration is willing to go. I think we have to go further and hence the bill I introduced and the one that you introduced and others.

And finally, on the question about the policy and the analysis functions, we are holding hearings right now—as a matter of fact, yesterday we had a rather extensive hearing in terms of how the Agencies go about their analysis function. We are very sensitive to that. I think you raise a very good point. I am not satisfied that the Secretary of State's charge in fact is supported by the evidence, but it is worth at least raising, and I think that we will do that in the coming months.

Senator SPECTER. One final statement in agreeing with your agreement. Witnesses have not been badgered in the Intelligence Committee procedures, but Senators have been badgered by witnesses.

Chairman BOREN. Thank you very much, Senator Specter, and we did have hearings yesterday focused specifically on the point of making certain that intelligence analysis is carried out in an objective way. That will be a real focus of oversight for this committee as well as overseeing covert activities and the general budgetary needs of the intelligence community.

We turn now to Senator Wyche Fowler of Georgia. Senator Fowler, I apologize that we have gone longer than anticipated and we appreciate your being very patient with us. I know this is an area in which you have had great interest as a member of the House of Representatives. Serving with you on another committee of the United States Senate, it is a special privilege to have you appear today, having observed your thoughtful contribution to that committee. We appreciate your taking the time to bring proposals for our consideration today. We know you have introduced Senate Bill 1582 and we would welcome your summary of the proposals of that bill and your reasons for making those proposals.

STATEMENT OF HON. WYCHE FOWLER, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator FOWLER. Mr. Chairman, I thank you very much.

I see we have her today one of the finest reporters in the land who worked with me for 8 years in the House, so I know he can translate effectively.

I know everybody is hungry. I do appreciate this opportunity. I will try to be brief. If I jump around a bit I will probably risk a little coherence, but I know the schedule and I appreciate your indulgence and the opportunity to testify today.

I commend to you and the committee the bills offered by the Vice Chairman of the committee, Mr. Cohen, and by Senators Specter and Glenn. While there are differences in language and scope—and I will point out the major differences—I congratulate all Senators who have testified for making significant contributions in the effort to improve American intelligence policy.

As a former member of the House Select Committee on Intelligence, I understand the importance of a strong intelligence capability. It is our first and most effective line of defense. None of the bills before the committee today should be construed as attempts to prohibit covert actions. Given the realities of the world in which we live, and the need to protect our vital national interests, we should always keep that option open.

But, I do believe that cover operations have been used much too routinely by Presidents from both parties over the last 3 decades. They have been used too often to carry out policies that could not withstand full debate and careful deliberation. Secrecy should never, under our system of government, provide a convenient means for short circuiting the democratic process.

I beg the committee's indulgence to allow me to quote from the 1976 Final Report of the Senate Select Committee, The Church Committee. And I quote. "The committee's review of covert action has underscored the necessity for a thoroughgoing strengthening of the Executive's internal review process for covert action and for the establishment of a realistic system of accountability." Then I will skip and put my whole statement in the record.

The Church Committee found the following. No. 1, covert action must be seen as an exceptional act, to be undertaken only when the national security requires it, and when overt means will not suffice. Second, on the basis of the record, the committee concluded that covert action must in no case be a vehicle for clandestinely undertaking actions incompatible with American principles.

Remember, this report was eleven years ago, before the mining of Central American harbors, before arms-for-hostages dealings, before diversion of illegal arms profits through third parties, and if we were in secret session today, I could cite examples of operations that the two committees stopped.

In my opinion, the central question we should ask as we consider all this legislation, with varying provisions for approval and notification, is this: when should covert operations, with their inherent danger of damaging disclosures and reversals, be undertaken? As we know from our experience with the safeguards presently in place, the new standards must not be ambiguous; they must not be easily circumvented; they must leave no room for equivocation after the fact.

The primary purpose of the bill I have introduced is to establish some tests, before the written Finding is signed by the President, that should be established at the outset. I support the notification requirements recommended by Mr. Cohen and Mr. Specter. But if we are to exercise oversight, it cannot be done as an afterview. Once the operation has been approved and especially if it is underway, then the lay of the land and the landscape completely change.

And as you have heard so many times on so many operations, once we are notified, whether in 24 hours or 48 hours, I submit that in some sense it is irrelevant, because the landscape has changed and the argument becomes: "The operation is underway. The word of the United States has been given, people's lives are at risk on the line, and you, members of the oversight committees of the Congress, change it at your peril."

The standards I propose, if they sound familiar, have a distinguished history. Except for the instance I am about to relate, these standards come verbatim from the National Intelligence Reorganization and Reform Act of 1978, introduced by Senators Huddleston, Bayh, Goldwater, Mathias, Byrd, Biden, Chafee, Garn, Hart, Inouye, Lugar, Morgan, Moynihan, Pearson, Wallop, Church, Cranston, Hatfield, Ribicoff, and Howard Baker.

I won't read those standards now; they are part of the record. But I have made what I feel to be one vital addition to these 1978 standards. Unlike the Iranian arms sales, which contradicted our renunciation of dealings with terrorists, all covert actions—and this is the extra standard—should be consistent with, and should support our publicly avowed foreign policy. Quite apart from questions of ethics or stable relations with our allies, this consideration goes to the heart of the effectiveness of American intelligence policy.

In its summary of the successes and failures of U.S. covert operations, based on what remains still the most comprehensive independent review of intelligence activities, the Church Committee found that, quote, "certain covert operations have been incompatible with American principles and ideals and, when exposed, have resulted in damaging this nation's ability to exercise moral and ethical leadership throughout the world. When covert operations have been consistent with, and in tactical support of, policies which have emerged from a national debate and the established processes of government, these operations have tended to be a success." End of quote.

I don't propose these standards to encroach on the President's authority to decide on secret operations. We must, however, insist on accountability. We must make certain that the President is actively and directly involved in any decision to launch a covert operation—by outlawing this absurd notion of a retroactive Finding. After all, the President does bear prime constitutional responsibility for the foreign policy that is put at risk in such operations.

Under my bill—and this is different from the other bills, on the reporting issues again—I would require prior reporting—prior reporting—to the Intelligence Committee in the case of all major covert operations except in extraordinary circumstances when such notice could be limited to the usual leaders of Congress and the eight on the list.

One unique provision of my bill in this area is the requirement that the limited notice exception that we are all operating under could only be employed where, quote, "time is of the essence." I commend this language to the committee in your attempts to settle the ambiguity question and to insure that the exceptions to prior notice are limited to only the most exceptional cases.

Chairman **Boren**. In your prior notice provision, is that notice prior to the issuance of the Finding or prior to initiation of action?

Senator **Fowler**. Prior to initiation of action.

And just to follow that up, again what we are trying to do is to get the questions that are asked after the fact, now, to be asked within the Executive Branch or the Intelligence Community before the recommendation goes to the President and before the Finding is signed—such as in applying the standards: "is this action absolutely necessary?" Simple questions, as Senator Cohen stated; common sense questions. "Is there no other way to accomplish our goals? Is it consistent with our foreign policy—or does it negate it?" By the time these questions are answered, there should be no problem in notifying Congress and making the case that the operation remain a secret.

I will add that a strict notification requirement has another beneficial effect, and that is, it would make the Congress, the arm closest to the people, accountable along with the President, as we should be. I believe this is a balanced approach, one that guarantees that leaders elected by the people, in both branches, are informed about the activities of our government and that we are working in concert.

Quickly, to end, there are two other provisions in my recommendations, Mr. Chairman, which differ somewhat from other alternatives the committee is considering. First is the specification of a supervisory, non-operational role for the National Security Council in the conduct of covert operations. This is not simply a reaction to the Iran-Contra affair. In fact, I would make the argument that all of this was proven necessary long before there was Iran-Contra. That bears no relevance except to show that if there had been standards in place, if there have been prior notification, it never would have happended. But this recommendation for a supervisory role only for the National Security Council is an attempt to clarify the decisionmaking process within the Executive Branch.

The other provision that is unique in my legislation is my attempt to differentiate and prioritize among different categories of intelligence activities. In brief, I've tried to set up a system where the level of Congressional involvement—some would say intrusion—is directly related to the level of risk. Thus, for covert operations requiring major resources, entailing major risks, strict statutory standards and prior reporting requirements that I have outlined would be mandated. For other covert operations, both the standard and reporting requirements would be reduced, and the President would be allowed to authorize such operations by category. This categorical authorization is similar to that found in the National Intelligence Act of 1980, which was introduced, but not passed, in the Senate.

Mr. Chairman, the hour is late so I won't end with the usual rhetoric.

Chairman **Boren**. If that precedent got established in the Senate, there is no telling where it might lead in terms of getting a lot of problems solved more expeditiously.

Senator **Fowler**. I would ask in the interests of clarity that my complete statement be made a part of the record.

Chairman **Boren**. It certainly will. Without objection the entire statement will be made part of the record.

[Prepared statement of Senator Fowler follows:]

PREPARED STATEMENT OF HON. WYCHE FOWLER, A U.S. SENATOR FROM THE STATE OF GEORGIA

Mr. Chairman, Mr. Vice Chairman, Distinguished Members of the Committee. I would first of all like to thank you for giving me this opportunity to appear before your committee, and for displaying great leadership in bringing the vital subject of intelligence oversight before the Congress and the American people.

Secondly, I want to commend the bills sponsored by the Vice Chairman (Senator Cohen), and by Senators Specter and Glenn. While there are some differences in language and scope, I congratulate all of the authors for making significant contributions in the effort to improve American intelligence policy, which is the overriding goal for all of us with an interest in this field.

As a member of the House Select Committee on Intelligence for eight years, I understand the importance of a strong intelligence capability. It is our first and most effective line of defense. None of the bills before the committee today should be construed as attempts to prohibit covert actions. Given the realities of the world in which we live, and the need to protect our vital national interests, we must always keep that option open.

But I also believe that covert operations have been used much too routinely by presidents from both parties over the last three decades. They have been used too often to carry out policies that could not withstand full debate and careful deliberation. Secrecy should never, under our system of government, provide a convenient means for short-circuiting the democratic process.

I would-beg the committee's indulgence to allow me to quote at some length from the 1976 Final Report of the Senate Select Committee To Study Governmental Operations (the Church Committee):

The Committee's review of covert action has underscored the necessity for a thoroughgoing strengthening of the Executive's internal review process for covert action and for the establishment of a realistic system of accountability, both within the Executive, and to the Congress and to the American people. The requirement for a rigorous and credible system of control and accountability is complicated, however, by the shield of secrecy which must necessarily be imposed on any covert activity if it is to remain covert. The challenge is to find a substitute for the public scrutiny through congressional debate and press attention that normally attends government decisions. In its consideration of the present processes of authorization and review, the Committee has found the following: 1) The most basic conclusion reached by the Committee is that covert action must be seen as an exceptional act, to be undertaken only when the national security requires it, and when overt means will not suffice. The Committee concludes that the policy and procedural barriers are presently inadequate to insure that any covert operation is absolutely essential to the national security. These barriers must be tightened and raised or covert action should be abandoned as an instrument of foreign policy. 2) On the basis of the record, the Committee has concluded that covert action must in no case be a vehicle for clandestinely undertaking actions incompatible with American principles.

Remember, this report was eleven years ago, before the mining of central American harbors, before arms-for-hostages dealings, before diversion of illegal arms sales profits through third parties to accomplish secret foreign policy objectives.

In my opinion, the central question we should ask as we consider legislation, with varying provisions for approval and notification, is this: when should covert operations, with their inherent danger of damaging disclosures and reversals, be undertaken? As we know from our experience with the safeguards presently in place, the new standards must not be ambiguous; they must not be easily circumvented; they must leave no room for equivocation after the fact.

The primary purpose of the bill I have introduced is to establish such tests, which would have to be satisfied at the outset. Specifically, no covert action should ever be undertaken without a written Finding from the president that it is essential to the national defense or foreign policy of the United States. With an inherent danger of disclosure, with a mixed record of accomplishment, and with their risk of long-term damage to the success of other American foreign policy objectives, covert actions should not be routine. As a foreign policy tool that must necessarily remain shielded from our normal democratic processes and as a method which often has a very low cost-benefit ratio, covert action ought to be seen by the Executive Branch, by the American public, and by our friends abroad, as a last resort.

They should only be employed when circumstances dictate the use of extraordinary means and no alternatives are available. We violated these premises in this decade of harbor minings and assassination manuals. As a result, we only complicated our efforts to conduct a credible policy in Central America.

If these standards sound familiar, it is because they have a long, and I would say, distinguished history in this committee and in the Senate. They are taken verbatim from the "National Intelligence Reorganization and Reform Act of 1978" introduced by Senators Huddleston, Bayh, Goldwater, Mathias, Byrd, Biden, Chafee, Garn, Hart, Inouye, Lugar, Morgan, Moynihan, Pearson, Wallop, Church, Cranston, Hatfield, Ribicoff, and Howard Baker.

I have made one what I feel to be vital addition to the 1978 standards. Unlike the Iranian arms sales, which contradicted our renunciation of dealings with terrorists, all covert operations should be consistent with, and should support our publicly avowed foreign policy. Quite apart from questions of ethics or stable relations with our allies, this consideration goes to the heart of the effectiveness of American intelligence policy. In its summary of the successes and failures of U.S. covert operations, based on what remains the most comprehensive independent review of clandestine intelligence activities, the Church Committee found that "certain covert operations have been incompatible with American principles and ideals and, when exposed, have resulted in damaging this nation's ability to exercise moral and ethical leadership throughout the world . . . (W)hen covert operations have been consistent with, and in tactical support of, policies which have emerged from a national debate and the established processes of government, these operations have tended to be a success."

In addition, the president should specify what government or private entity will conduct the covert operation, and specify its authorized duration. While this does not prohibit the use of independent agents where they are necessary, it does prevent the executive branch from going outside official channels to escape oversight and responsibility.

I do not propose these standard to encroach on the president's authority to decide on secret operations. We must, however, insist on accountability. We must make certain that the president is actively and directly involved in any decision to launch a covert operation—by outlawing the absurd notion of a retroactive finding. After all, the president bears prime constitutional responsibility for the foreign policy that is put at risk in such operations.

Several of the bills before the committee today are directed at clarifying and improving Executive Branch reporting of covert operations to the Congress. I say without hesitation that all of them represent a significant improvement over the current system.

Under my bill, prior reporting to the intelligence committees would be required in the case of all major covert operations, except in extraordinary circumstances when such notice could be limited to the leaders of the Congress and the intelligence committees and could be withheld for no more than 48 hours from the making of the Presidential finding. One unique provision of my bill in this area is the requirement that the limited notice exception could only be employed where "time is of the essence." I commend this language to the committee in your attempts to craft unambiguous standards for both the Executive and Legislative Branches, and to insure that the exceptions to prior notice are limited to only the most exceptional cases.

These stricter requirements force the executive branch to give these matters the advance discussion they deserve: Is this action absolutely necessary? Is there no other way to accomplish our goals? Is it consistent with our foreign policy—or does it negate it? By the time these questions are answered, there should be no problem in notifying Congress and making the case that the operation should remain a secret.

A strict notification requirement would have another beneficial effect. It would make the Congress, the arm closest to the people, accountable along with the President. I think this is a balanced approach, one that guarantees that leaders elected by the people, in both branches, are informed about the activities of our government and are working in concert.

We know from experience that this is the only way our foreign policy can be carried out with any chance of success. It is the only way to ensure the consensus, the solid commitment of the American people to stand behind the actions of our intelligence community, if they become public knowledge. We must not forget that the people are the ultimate source of authority under the Constitution, and covert operations are no exception.

There are two other provisions in my legislation which differ somewhat from other alternatives the committee is considering. First is the specification of the supervisory, non-operational role for the National Security Council in the conduct of covert operations. This is not simply a reaction to the difficulties explored by the Iran-Contra Committee, but is also an attempt to clarify the decision-making process within the Executive Branch. The NSC can play an invaluable role as the President's independent analyst on national security matters. It loses that perspective and that value when it becomes an active, operational party in such matters.

The other provision is my bill's attempt to differentiate and prioritize among different catergories of intelligence activities. In brief, I tried to set up a system where the level of Congressional involvement and intrusion is directly related to the level of risk. Thus, for covert operations requiring major resources or entailing major risks, the strict statutory standards and prior reporting requirements outlined above would be mandated. But for other covert operations, both the standards and the reporting requirements would be reduced, and the President would be allowed to authorize such operations by category. (This categorical authorization is similar to that found in The National Intelligence Act of 1980, which was introduced in the Senate as S. 2284.) All other intelligence activities would be treated essentially as they are under current law.

This effort to prioritize the initiation and oversight of intelligence activities is designed to focus greatest Congressional scrutiny on the most sensitive intelligence projects. Once again, the concern is to improve the intelligence product prepared on behalf of the American people.

I know that my constituents are weary of the wild swings we have experienced in our system of checks and balances: executive excesses that elicit full-scale congressional inquisitions in response. These make for good television, but they assuredly do not make for good government. This is the perfect time, as we mark the 200th anniversary of our Constitution, to adopt a relationship that works, by clarifying the standards by which covert actions can be undertaken. Only then can those of us in Washington restore some sense of cooperation, and concentrate fully on creating the sharpest intelligence service and the most effective foreign policy.

Chairman BOREN. We appreciate the contribution you've made to our thinking this morning. I was particularly interested, in addition to the procedural matters which you set forth and clarifications in the bill, in the policy considerations. Your point that covert actions should always be consistent with our stated objectives of public foreign policy is a very interesting one and a thought that I am certainly going to reflect upon.

Senator Cohen, do you have any questions at this point?

Senator COHEN. Well, just a couple of points. Senator Fowler, I agree with you with respect to the NSC not being involved in operations. In fact, Mr. Carlucci while at the NSC did agree with Senator Boren and myself that NSC would be barred from engaging in operations. I believe next week we will see some recommendations coming forth from the Iran-Contra Committee that will be consistent with that particular recommendation. So I would agree that it ought to be in any legislation that we in fact pass.

Second, as I understand it, you do make an exception for notification prior to action to the Congress in those circumstances that are extraordinary where time is of the essence. Nonetheless, the President there could take action and then notify the Gang of Eight, so-called, within a short period of time, is that correct.

Senator FOWLER. That's correct. And I have the usual war exceptions and that sort of thing.

Senator COHEN. I think there has been a tendency in the recent past to resort to covert action to carry out foreign policy objectives. In doing so, it tends to undermine the established procedures whereby we have public debate over those policies. I think there has been a tendency to perhaps proliferate covert actions. I have a view that they ought to be like silver bullets, used on very rare occasions. And I notice in a book that has been hitting the charts lately called Veil, that there is a quote attributed to a Mr. Helms—and I would hasten to point out that is Richard Helms and not Jesse Helms—and perhaps I shouldn't raise it in this forum at this time, but the quote attributed to Mr. Helms was "covert action is like a damn good drug: it works, but if you take too much of it, it will kill you." I think that that is a quote that we ought to keep in mind in terms not over using or abusing a valuable tool which can be called upon by a President in extraordinary circumstances, but we ought not to make a larger part of our foreign policy mechanism than it should be.

Senator **Fowler**. Well, I appreciate that, Senator Cohen. As I say, if you put it all together and go back to '78 and the Church Committee, the Pike Committee—major bipartisan recommendations—all have to do with standards. These standards are a fancy name for very common sense questions. The term "important"—the standard in the law—that the President certify that this is "important" to the national security—there can be no more amorpohous word that has no specificity, that no one can define in this context than "important."

But if you say that such activity is essential to the national defense of the United States, if you have to ask whether or not the benefits of such activity justify the foreseeable risk and the likely consequences of its disclosure, if you have to ask whether or not there is any alternative that can accomplish the same objective without resorting to this, and the President makes that certification in a written Finding, then we will know we had been through a review process that we can all be held accountable to, and that we can proudly support if the disclosure comes in this highly technology world. If somebody can tell me how you can run a paramilitary operation of any size in the kind of world that we have, much less recruit an army, or even a squad, without the likelihood of eventual disclosure, then I would like to hear. We had this discussion in my hearings back in 1983 with Mr. Colby and all the other former CIA Directors.

But I want these things to work when we have to use them. I don't want them to be disclosed, but I want to be able to face the American people if they are disclosed and say, "We went through this together. We're not 'managing' foreign policy. We are coordinating a covert foreign policy with publicly declared principles under the statutory foreign policy of the United States.

I thank the Chair.

Chairman **Boren**. Thank you very much, Senator Fowler. What you have said, what others have said today helps this committee immensely in the exercise of our own responsibility. We bear a heavy responsibility in this committee, the responsibility of weighing and balancing the need for secrecy in some operations from a national security point of view. At the same time, we must be able to ensure the American people that there has been full accountability to their elected officials for the conduct of these operations, and that there has been full consideration from a policy point of view given to those operations, both by the Congress and by the President as well.

This is a responsibility that we take very seriously and we welcome these suggestions as methods for improving our ability to carry out the oversight function that is assigned to us.

These hearings will stand in recess.

[Thereupon, at 12:20 o'clock p.m., the hearings were recessed, subject to the call of the Chair.]

OVERSIGHT LEGISLATION HEARING

FRIDAY, DECEMBER 11, 1987

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Select Committee met, pursuant to notice, at 9:56 o'clock a.m., in Room SD-562, Dirksen Senate Office Building, the Honorable David Boren, Chairman of the Committee, presiding.

Present: Senators Boren, Bradley, Cohen, Hatch, Murkowski, Specter, and Hecht.

Staff present: Sven Holmes, Staff Director and General Counsel; James Dykstra, Minority Staff Director; and Kathleen McGhee, Chief Clerk.

PROCEEDINGS

Senator **COHEN**. The committee is going to come to order. There is a vote in progress on the Senate floor but I am told that Senator Boren is on his way back. And in the meantime, Senator Rudman has been waiting patiently—always the first to vote—and has come to appear before the committee this morning.

Senator Rudman, it's with a great deal of pleasure that I welcome the former Vice Chairman of the Iran-Contra investigatory committee to make a statement concerning legislation which you have sponsored.

Senator **RUDMAN**. Thank you very much, Mr. Chairman. I just want to correct you in one respect. I found out to my surprise last evening that the House Committee has been extended until March. I then found going back and looking at our Resolution that, although our report was due at a date certain, the committee seems to live forever.

I guess it expires, if that's the right word, at the conclusion of the 100th Congress.

Senator **COHEN**. I stand corrected, Mr. Vice Chairman.

Senator **RUDMAN**. So I guess we are still in business.

STATEMENT OF HON. WARREN RUDMAN, A U.S. SENATOR FROM THE STATE OF NEW HAMPSHIRE

Senator **RUDMAN**. I am tempted, knowing that the Vice Chairman would like a nice thick hearing record, I was tempted to ask unanimous consent that the committee incorporate the entire Iran-Contra hearing with exhibits into this hearing record. But having been told that will cost many thousands of dollars, I'm not going to yield to temptation.

But I would say that what is in that report is of extraordinary importance to what this legislation intends to do.

I don't intend to talk about the details of the Iran-Contra affair today because the report is out, and a large portion of it was written with the active participation not only of Senator Cohen and Senator Boren but of key staff members including the Staff Director of this committee. So I think it's not important to get into the specificity of the report.

Instead, I want to talk about the need for S. 1721 based on those hearings and what we learned in the investigation. I believe that this bill should be enacted into law, either in its present form or with some changes that the sponsors and the committee believes constructive after discussions with members of the committee, with the Administration, people in the agency, with the National Security Council, and the Justice Department. But I have to say that there will be two charges made against this legislation which in my view will be totally erroneous. One, that somehow this is fighting yesterday's battles. We are trying to really prevent some of tomorrow's battles from being fought.

And second, there is no question that if anybody wants to testify that you cannot write any statute that will stop any official who is determined to ignore the law from breaking that law, then I will stipulate that. There is no statute that can be written that will, in perpetuity, guarantee observance of whatever the prohibitions are within that statute.

That, of course, is no reason not to write laws. We have many laws and they are broken regularly and we attempt to bring people to the bar of justice for that. And so those charges are really not relevant in my view to this legislation.

With regard to the intelligence related aspects of the Iran-Contra affair, we are dealing really with 4 laws. And for the record, two of them were statutes—the National Security Act and the Hughes-Ryan Amendment. Two of them were Executive decrees. One is Executive Order 12333 and of course the National Security Decision Directive 159.

It is important to note that under the leadership of the then National Security Advisor, now Secretary of Defense, Frank Carlucci and the members of this committee, primarily the Chairman and the Vice Chairman and their counterparts on the House side, that the Administration has announced a policy which has met with widespread approval. What this bill essentially does is take the elements of those existing laws and policies and evaluate them to statutory authority. And to clarify some of those agreements. And in reality, it really conforms them to the rules that most of the government thought applied all along.

For example, retroactive Findings are prohibited. We do not have to relive November of 1985. And I am sure that had there been such a prohibition, maybe the entire matter may well not have occurred.

Second, those Findings ought to be in writing. It ensures that the President of the United States makes the decision and is accountable. I must say that there is a great deal of confusion still in the minds of many, including the President, as to whether he approved a particular act back around the first arms sale to Iran in August of 1985.

That should not happen in the government such as ours. In matters involving the extraordinary importance of the execution of American foreign policy there should be a clear record conforming with law. This should not be a la the Gettysburg Address, written on the back of the envelope and lost in someone's drawer, never to be found again. So I would certainly hope that people would not think that imposed some undue burdens on the Chief Executive.

There should be a finding for all covert operations, if there is any confusion about that, regardless of the implementing agency. Certainly, that would apply in the Iran-Contra affair to the NSC and DEA, which implemented covert actions without Presidential approval according to the testimony spread on that record, and that notwithstanding provisions of the National Security Directive, namely 159.

You may all recall, having read the record or attended the hearings, there was some discussion with a number of witnesses about that, including Mr. McFarlane and General Meese. There certainly was no doubt that everybody was aware that this requirement existed, but somehow it did not get followed. Another example, of what we don't need to happen again.

Timely notice to Congress and regular review of on-going covert operations. I think one of the astounding aspects of the Iran arms sale is that once the decision was made in January of 1986, with the knowledge and dissent, I might add, of the Secretarys of State and Defense, and the Attorney General was aware, it was never reviewed again for the next 10 months. Now, that is not in the best interest of the Chief Executive or of the Congress, particularly with the limited notification authority that is allowed under the law, the so called limited authority with only notification to certain key leadership figures.

Now, by elevating these and other rules to statutory form, it seems to me it gives them greater weight and better focuses the attention of Federal officials on these laws. I think we can say with some certainty that we know in our dealings with the Executive Branch of the government that when certain laws are well known and well established, they are followed and followed carefully. And if there is a dispute about how they should be followed, those disputes are fought out with the appropriate members of Congress and compromises are reached. But, we don't have default, which is what we had here.

I think it is important that all officials know the rules. We had situations where officials, even the National Security Advisor, were conversant with Hughes Ryan and they were conversant with the National Security Act. But they weren't familiar with provisions of Executive Order 12333 and NSDD 159. I found that astounding, but that is what the record shows. And that's pretty much like a physician about to perform surgery without having ever really understood the human anatomy. Doesn't make sense, but that is what we found. They will not be able to say in the future, as some did with regard to the Executive Order and the NSD directive, well, the President made the rules so he can change them. That is in quotes. That was testified to. And by the way, it was implied, of course, he could do that without telling anyone. That's precisely the reason why this ought to have statutory form.

Now, there is one provision I would recommend adding to S. 1721, and that is a requirement that the Attorney General review proposed findings, ensuring proper attention is paid to the legal consequences of proposed operations.

Good morning Mr. Chairman.

Let me add a personal note. I don't believe Poindexter and North set out to break the law. I have never believed that for a moment. I said that publicly before, so my view should come as no surprise to anyone. I don't think they set out to break laws. North testified persuasively in my view that he was willing to take political heat for the Administration but that being named in the request for the Independent Counsel was not part of that deal.

Poindexter said, quote, "They were willing to take risks with the law." But I don't believe by that he meant that he set out deliberately to break it. Instead, rather than consulting with proper legal authority, they played the part, for the lack of a better word, of jail house lawyers, refusing to seek proper legal counsel, and thought they were skating by on the thin edges of the law.

If the Attorney General was part of the process, with the excellent staff of the Justice Department, it is my view that much of this would not have happened.

Let me just address, Mr. Chairman, the constitutionality of this. I know you will hear from Assistant Attorney General Cooper, who I think will be an excellent witness and was before our committee. And we probably will disagree. I will stipulate that I have not sat down and done a very thorough constitutional study of the issues myself, but I have a general understanding of where the thrust of those arguments come from. And let me just address them briefly, knowing you will hear from others more expert than I on that issue.

I know that the Administration thinks that this infringes on the foreign policy powers of the President, and thereby it has a constitutional problem. I would recommend that anyone interested in this read chapter 25 of the Iran-Contra report which discusses the relative powers of the Congress and the President in the field of foreign policy. I think it is one of the best parts of the report and one of the best pieces of writing on that subject I've seen anywhere. There was no question, the President is the primary actor in the field of foreign policy. There is no question he is the sole negotiator and spokesman for this country. As we've witnessed the events of the past 4 days in this city, we all understand that.

But operations in the area of national security and foreign policy require money. Congress, under the Constitution, has to approve or at least concur in that. And Congress cannot perform its constitutional function, given solely to it under the Constitution, without some regard to overseeing how the funds are expended, whether they be for agricultural subsidies or for the conduct of covert operations. Congress must be aware of how the funds are spent.

Now the provisions of S. 1721 certainly ensure Presidential accountability and that Congress gets information to which it is entitled.

Finally, I think it is constitutionally sound for one overriding reason. There was nothing within this legislation that attempts to nor could you—could the Congress—attempt to interfere with the President's right to conduct these operations. Obviously, he has to notify. But assuming the committees disagree, it's my understanding that the President would go ahead if he felt it was in the national security interest. The Congress might react in some way. But that is a whole other story.

The point is that there is nothing in this statute that interferes with the President's right to conduct covert operations. It does require him to notify the Congress. And thus, it seems to me, unless someone can make a persuasive case that there is an interference in his conduct of those operations, that a constitutional argument does not wash.

But I'm sure you'll want to ask Mr. Cooper about that. If you have any questions, I'll be very glad to answer them.

Chairman **Boren**. Thank you very much, Senator Rudman. I apologize for my late arrival. The Vice Chairman and I were both tied up in an earlier meeting this morning. He extricated himself more quickly than I did to get here and I am sorry that I missed the beginning of your statement. But we appreciate your being present. You've made a tremendous contribution to the country and specifically to this field of inquiry while serving as Vice Chairman of the Senate Select Committe in the investigation into the Iran-Contra matter. I think that the contributions that you made were certainly among the most thoughtful and helpful to the future conduct of national security operations for this country.

I really appreciate you taking the time to come this morning.

Senator **Rudman**. I thank you very much, Mr. Chairman.

Chairman **Boren**. Senator Cohen, questions?

Senator **Cohen**. It's not necessarily a unanimous reflection of the Congress, however.

Senator **Rudman**. I'm well aware of that. But I thought at least in this room it might be.

Senator **Cohen**. I think on this committee it certainly is.

I want to add my own comments and congratulations on the role you played on that committee. Both of us really benefitted from the association with you and your leadership as Vice Chairman on behalf of the Senate. We were pleased and impressed with your performance and our association with you, I think, was enhanced as a result of that.

Let me ask you a couple of questions, Senator Rudman. Mr. Cooper is behind you. I got a copy of his statement last night around 9:30 and had a chance to read through it quickly, and I know that you have not had a chance to do that. But I'd like to just pose a couple of issues raised by Mr. Cooper.

One such issue is United States v. Curtiss-Wright. You heard about that during the course of the Iran-Contra debate. We see it again in Mr. Cooper's statement for presentation. We'll talk about it later, but it is frequently cited as the basis, the keystone for Presidential authority.

And some of the language quoted in Mr. Cooper's testimony is that the President is the sole organ of the federal government in the field of international relations. Is that your understanding of the reading of either that case or the Constitution itself that the President is the sole organ in the field of international relations?

Senator **Rudman**. Well, you know it's like, in my view, and I'm familiar with the case, it's like many other cases which address an issue but do not address other issues which are not either tangential or central.

That case certainly stands for the proposition that very few people agree—disagree with. The President of the United States is solely responsible for the conduct of foreign policy. But it is also a given that that foreign policy must be conducted with the financial assistance of the Congress because the Congress has the sole power to appropriate and authorize the expenditures of funds.

Now it seems to me that when you look at that case and at other cases on Presidential power and the Constitution, and then you look separately at the power of the Congress, you reach the conclusion that it is really a joint venture between the Congress and the President. The President is the sole spokesman. He can formulate whatever policy he wishes. But no one would seriously argue, except possibly Admiral Poindexter based on his testimony, that once the President formulates that policy, that he can implement it without the ~~active~~ assistance of the Congress because the Congress must appropriate the funds. And if the Congress decides, as it did to President Ford back at the time at the end of the Vietnam War, that the Congress was having no more of it and the President wanted to carry out a policy, the Secretary of State Kissinger wanted to carry out a policy, a policy that they firmly believed in, the Congress said we're not going to allow you to do that. And that was the end of the policy. So you can't read that case in a vacuum. I guess that's my response.

Senator **Cohen**. Well, we'll have a chance to discuss that a little bit further. Mr. Cooper, perhaps you can refresh my recollection of that case. As I recall, that was a case in which the President was acting pursuant to a Congressional mandate in the form of a statute. It was not a case of a President acting either in contradiction of a congressional position or in the absence, but rather pursuant to a congressional mandate. And I think that that language that has frequently been cited falls in the realm of dicta more than holding, but that gets a bit technical. Perhaps we can explore that a little bit later.

Senator Rudman, what about the argument that will be made that if in fact we place a 48 hour definition or restriction upon timely notice, first, that it will interfere with the President's ability to carry out his functions, and second, in this case in particular that you may find countries who put to the President the proposition that if you have to tell even 8 Members of Congress that they will help you carry out this particular intelligence or covert activity. What would your response be to those arguments?

Senator **Rudman**. Well, I would, I guess, have two responses.

In the first place, as far as interfering with the President's ability, I just don't think that washes. It just doesn't. The notification procedure is so narrowly construed under some circumstances that that notification can be made very readily. And I know that it has been on a number of occasions. I am not familiar with all of them because I don't sit on this committee. But certainly the Chairman and Vice Chairman are aware of situations where this has occurred, formally and informally. It has been done with the leadership and it has worked. So that just doesn't wash. We're all in the same city. It's a 10 minute ride between the opposite ends of Pennsylvania Avenue and it can be done.

As far as the other argument is concerned, I must reject that out of hand. We're not going to get in the position in this country, whether intelligence or anything else, where foreign countries are going to effect the way our democracy operates because they don't particularly like the way we do it. I mean that's the way we live in this country and that's part of our principle and part of our principle is shared power under three co-equal branches. And they may not like it. And I say that's just tough.

Senator COHEN. So if the Canadian government for example were to come to a President and say," I'm sorry, but we can't help you extricate certain hostages out of country X if you're going to tell Congress about it in any fashion," that would be no justification for the President to withhold information.

Senator RUDMAN. In my view, it would be none at all. It's another form of diplomatic blackmail. And quite frankly, I think if I were sitting in a position of the Administration official being told that, I think my response would be such to make them possibly reconsider.

There are a number of responses which could be made under those circumstances.

Senator COHEN. Perhaps you can give us covert notice of what those——

Senator RUDMAN. Whatever.

Chairman BOREN. Senator Specter? Questions?

Senator SPECTER. Thank you very much, Mr. Chairman.

Senator Rudman, I join in welcoming you here and commend you for your outstanding work on the Iran-Contra Committee. A question or two.

Although we carry out these conversations customarily in corridors or on the Senate floor, for the record I think it would be useful to develop just a bit more a few of the points which Senator Cohen has made.

Senator Cohen is correct in referring to the Curtiss-Wright case as being a matter involving a congressional resolution so it's a joinder of congressional and executive authority. And there's a great deal of authority, which we will be getting into when Mr. Cooper testifies, about the large role which Congress has on foreign relations.

It seems to me that a testing of constitutionality would turn on the factual situation and circumstances as to how much Congress wants to exert its authority here. And the cases talk about the reciprocity, accommodation and the interrelationship of the two branches.

My question to you is, considering the exigencies of secrecy and national security, do you think that there is any excessive risk in having information on covert actions communicated to a limited number like 8 Members of the Congress?

Senator RUDMAN. I absolutely do not. And the reason I do not is not as a matter of hunch, I do that as a matter of knowledge of what has gone on in the past. And the fact is that these committees and the small group of leadership involved in limited notification, I believe it is accurate to say there has not been one breach of information in recent years. At least not one that I am aware of. I'm aware of a number of situations where notification had to be done and you are aware of many more, being on this committee. I don't think that's a problem.

Senator **Specter**. When we were formulating various approaches, we had a Saturday session of the Intelligence Committee back in late June—we were concerned with this issue in considering a range of congressional involvement. And one option is to have this information given to the entire Intelligence Committee. The second was to have the 4 members of the leadership and the Chairman and Vice Chairman of the Intelligence Committees and a third was just to have it given to the 4 leaders, 2 in each House.

I would be interested in your view as to whether you think that there might be a broader range of information, say given to the entire Intelligence Committee?

Senator **Rudman**. Well, I'm not sure I'm the person to answer that question. I can answer it generally. I've always wanted to serve on this committee. It's been one of my disappointments that I have not been able to. So I'm really not an expert in that area.

But it seems to me there is some sense in limiting distribution on certain highly sensitive kinds of matters. That is not because one person is more trustworthy than the other. I just think that as you limit information, you tend to strengthen the possibility that there will not be inadvertent disclosure of that information.

Now it seems to me that those are decisions that have to be made by the Administration. I think they ought to be made by the Administration. I don't think we can have a sharing or a statutory scheme that would determine when there would be broad notification when there would be narrow notification, if that's your questions.

Senator **Specter**. The issue would be whether the Intelligence Committees or the full committee ought to have access to this information. Or, whether it ought to be limited to a more select group.

Senator **Rudman**. I must say that I think that under some circumstances, just for reasons of logic and security, that the smaller the group that has the knowledge, then the more secure both sides can feel that there will be no inadvertent disclosures. I do not believe for a moment that there would ever be deliberate disclosures. But there could be inadvertent disclosures. And I think limiting it to the leadership in certain extraordinary cases is probably prudent, although I could probably argue the other side as well. I mean everybody shares responsibilities in this committee and I understand the sensitivity, but I do not object to the present system. I truly do not.

Senator **Specter**. The other factor that I think would weigh significantly in a constitutional evaluation, should this issue ever come to the court, in addition to the subject of disclosure, would be the question of utility—the question of the responsibility and the helpfulness of the Congressional leadership on this issue in terms of national welfare. This comes into sharp focus in the sale of arms to Iran and the proposition that many of us have articulated that had other heads, not necessarily wiser heads, but additional people, been involved in this transaction, that the sale of arms to Iran would have been stopped at a much earlier stage. There would have been a difference in the approach of the foreign policy of the United States Government.

My question to you, in light of the extensive work you have done in this field, is to what extent do you think it would be helpful—not only on the sale of arms to Iran, but on matters we might speculate on in the future—for the Executive branch to have the corporate wisdom of the leadership, the Chairman and Vice Chairman of the Intelligence Committees in terms of affecting, perhaps even changing U.S. foreign policy.

Senator RUDMAN. I believe and have said before that had the limited disclosure been made at the time of the entire episode unfolding, that it never would have got beyond the first fold.

Had the Chairman and Vice Chairman and Chairman and Ranking member on the House side and the leadership ever been brought into this, I think that the wise political heads on those committees and leadership would have made a very strong case that would have given the President great pause about going forward, irrespective of how worthy his objectives were in his mind in relation to the hostages.

Senator SPECTER. I have one final question, if I may. Senator Rudman, you're a constitutional lawyer of some standing, in my judgment. There is an issue pending as to the authority of the President to ignore a provision of a statute which he has signed. There recently was legislation which related to certain people being excluded by the FBI and not having——

Senator RUDMAN. I am aware of that problem, yes.

Senator SPECTER. Well, my question is considering the presumption of constitutionality which attaches to legislation, especially when the President who has signed it, and considering the fact that the issue was not raised with the Congress and the bill was not vetoed and sent back for the exclusion of the provision, would you care to make an observation on the constitutionality of the President's action on that issue.

Senator RUDMAN. I'd be very happy to. I was faced with this situation as Attorney General in New Hampshire on numerous occasions, when the legislature, that did not have the kind of legal advice that this Congress has, would pass legislation that was obviously unconstitutional and not necessarily infringing on a Governor's power but on other parts of our State constitution, dipping into taxing area where we have a very special constitution in that sense.

And I would always advise the Governor that if you sign this, then under your oath it seems to me that you have to take care that this law is faithfully executed unless a court proves otherwise. And if you really have problems with it, or even if you don't have problems with it if you think that it's got a problem and I'm advising you it does, I suggest you veto it. Because if you don't veto it, it seems to me you can't have it both ways. You can't read a statute like a menu and say well I'm going to take the entree and the main course but I don't like the dessert. That's not the way it works.

I think the President has not received good advice on that issue. It seems to me that the law should have been vetoed. And the veto would have probably been sustained under those circumstances, if in fact they can make a strong case, and the committees would have redrafted it.

If it wasn't unconstitutional, I dare say that Congress would get its opinion and pass it over the veto and then of course the President could say I'm going to ignore this section and we're going to have a test case on it.

But you know what we don't need around here, it seems to me, is a proliferation of laws. We're going to have a new catalogue. We're going to have the War Powers Act. Well, we all know it's okay here but it's unconstitutional here, so when we get to this confrontation, we're going to skate around this one. And now we have another law and we don't think this is constitutional. And we're going to skate around this one. I mean pretty soon you know we won't know what is the law and what is tradition.

And I would like to see this particular law straightened out early on because I read it, I know the problem, I have discussed it with Senator Cohen. I've read Senator Cohen's statement, superb statement given on the floor I think sometime last week on the issue. And I think it is just an accident waiting to happen. And it ought not to be. So I would say that they either veto these things or they say, no, we're going to abide by it until it's overturned and we think it ought to be. But you can't have it both ways.

Senator SPECTER. Thank you very much, Senator. Thank you, Mr. Chairman.

Senator BOREN. Thank you, Senator Specter.

Senator Hecht, any questions?

Senator Murkowski?

Senator MURKOWSKI. Thank you. Senator Rudman, as a member of this committee for the last few years, I've been frustrated by what I sense is a procedure, particularly with regard to covert activities, where you better ask the question absolutely right. Because if you don't, you're going to get an honest answer but it may not be a complete answer. And I am sure my colleagues have expressed this frustration as well. I'm wondering if you have any opinions with regard to a procedure for dealing with this problem, such as a sworn testimony, specific penalties for lying?

Senator RUDMAN. Well, there are penalties for lying to Congress now.

Senator MURKOWSKI. I understand

Senator RUDMAN. And I think they are appropriate. And I think they ought to be imposed in cases where they are appropriate.

I also must say quite frankly that the problem you face is not any different from that of a trial lawyer during a very complex deposition. What you really have to do is to look at the issue, find if it has 6 sides, 8 sides, or 12 sides and ask the question every way it can be and then in reverse. That's about the only suggestion I can give you. If people don't want the whole truth out, it takes persistence in getting out. In reading the record of this committee in one particular area involved with Iran-Contra, I daresay you ran into that problem.

Senator MURKOWSKI. Well the difficulty is we don't have the self-cleansing that a committee that's operating in the view of the public and the continued scrutiny of the press to follow up. And that's the uniqueness of this particular committee and it's also the shortcoming of this particular committee because that follow-up, that balance just cannot be there and we're faced with this dilemma of how to be absolutely sure that we're getting the information that we must have.

Senator RUDMAN. Well, based on the Iran-Contra hearings, I would say in one instance that it would be a very good thing to advise all witnesses that if we ask you a question you've got problems with because your superiors have given you specific instructions on those questions, we would like you to simply ask for recess and discuss those with your superior before testifying further. We would have avoided a lot of trouble had that happened in one particular witness.

Senator MURKOWSKI. Thank you. Mr. Chairman, thank you.

Chairman BOREN. Senator Hatch?

Senator HATCH. I just want to welcome Senator Rudman here. And I want to compliment him for his hard efforts. He really worked very hard on the Iran-Contra matter. I don't think anybody on either committee in the House or the Senate put in the time or the effort or read all the documents as much as this good Senator has.

Unfortunately, we didn't always agree. But——

Senator RUDMAN. We agreed occasionally, Senator Hatch.

Senator HATCH. We agreed quite a bit really. Actually on the basic things I think we basically agreed. And I just want him to know of my respect for him and the indefatigable effort that he made. And we appreciate your testimony here today.

Thank you.

Senator COHEN. I think that constitutes a retroactive ratification of the majority opinion. [General laughter.]

Chairman BOREN. Is there any objection to the record reflecting that?

Senator HATCH. I think I had the appropriate caveats.

Senator RUDMAN. I don't think I'd go quite that far. At any rate, I hope that I've been helpful in some way and thank you very much for inviting me to testify.

Chairman BOREN. You've been very helpful and we really appreciate you being here, Senator Rudman.

Senator HATCH. By the way, Warren, we still think there were some hysterical parts in the majority. [General laughter.]

Senator MURKOWSKI. Mr. Chairman, I would ask unanimous consent that my statement be entered into the record as read.

Chairman BOREN. Without objection.

Senator **Murkowski**. Complimenting you and your colleague, the Senator from Maine, on where we are today and where we are going.

Chairman **Boren**. There will certainly be no objection to any statement complimenting the Chairman and Vice Chairman from being entered into the full record.

Senator **Murkowski**. Just don't read the statement in its entirety.

[Prepared statement of Senator Murkowski follows:]

Prepared Statement of Hon. Frank Murkowski, a U.S. Senator From the State of Alaska

MR. CHAIRMAN:

I COMMEND YOU AND THE VICE CHAIRMAN FOR TAKING THE LEAD IN ADDRESSING THE THORNY ISSUE OF LEGISLATIVE OVERSIGHT OF COVERT ACTION. SINCE THE CREATION OF THE CIA IN THE EARLY DAYS OF THE COLD WAR, CONGRESS HAS HAD TO WRESTLE WITH THE PROBLEM OF HOW TO MAKE COVERT ACTION, LIKE OTHER ASPECTS OF FOREIGN POLICY, ACCOUNTABLE TO THE CONGRESS--WITHOUT DESTROYING THE EFFECTIVENESS OF SUCH OPERATIONS. THERE IS A NATURAL TENSION BETWEEN SECRECY AND DEMOCRACY AS THERE IS BETWEEN EXECUTIVE AND CONGRESSIONAL POWERS UNDER THE CONSTITUTION.

ON THE WHOLE, WE HAVE DONE PRETTY WELL. WE HAVE BUILT PROBABLY THE FINEST INTELLIGENCE SERVICE IN THE WORLD AND OUR DEMOCRACY ~~IS STILL~~ REMAINS STRONG AND VIBRANT. STILL, IT IS CLEAR THAT CONGRESSIONAL OVERSIGHT MUST BE STRENGTHENED. COVERT ACTION CARRIED OUT BEHIND CONGRESS' BACK IS UNLIKELY TO SUCCEED FOR LONG. LIKE OTHER ELEMENTS OF FOREIGN POLICY, COVERT ACTION REQUIRES AN INFORMED AND SUPPORTIVE CONGRESS. A COVERT PROGRAM THAT CANNOT PASS THE TEST OF SKEPTICAL CONGRESSIONAL SCRUTINY, IS A POOR BET.

WORKING THROUGH THE TWO INTELLIGENCE COMMITTEES, CONGRESS HAS PROVEN THAT OVERSIGHT OF COVERT ACTION CAN WORK. CONTRARY TO POPULAR IMPRESSION, THE TWO COMMITTEES HAVE AN EXCELLENT RECORD IN KEEPING CLASSIFIED INFORMATION SECRET. MEMBERS TAKE THEIR RESPONSIBILITIES VERY SERIOUSLY. THE ASSUMPTION THAT THEY WILL PLAY FAST AND LOOSE WITH NATIONAL SECRETS IS TOTALLY UNWARANTED.

Chairman **Boren**. Let me make just a brief introductory comment before we call on Assistant Attorney General Cooper.

Today's hearing before the Intelligence Committee considers two bills designed to improve intelligence oversight procedures. One is S. 1721, introduced by Senator Cohen and several others, including myself; and S. 1818, introduced by Senator Specter.

The witnesses are the Vice Chairman of the Special Iran Committee, a co-author of S. 1721, Senator Warren Rudman, who just gave his testimony; our House Intelligence Committee colleagues, Congressman Stokes, Chairman of the House Committee on Intelligence; and Representative McHugh; and Assistant Attorney General Charles Cooper from the Justice Department. Mr. Cooper will follow after the testimony of Senator Rudman, and then we will hear from Congressman Stokes, and then Congressman McHugh.

Before we continue, let me review very briefly where we stand in the process. Today's hearing is another step in the committee's lengthy and comprehensive study of the need for changes in the oversight statutes. We began the current phase of that study over a year ago, on December 1, 1986, when the committee initiated its preliminary investigation into the Iran-Contra matter.

It should be noted, however, that the committee has continuously analyzed the issues raised and the ambiguities in the applicable statutes since 1981. Without objection, I would like to place in the record a more detailed statement that describes the committee's exhaustive consideration of these issues.

That statement underscores how extensive the legislative record is for final action by the committee.

The record of the past year includes, first of all, the committee's preliminary Iran-Contra investigation which concluded with a public report on January 27, 1987. During that inquiry, we discussed the interpretation and application of the oversight laws with the Secretaries of State and Defense, the Attorney General, the President's Chief of Staff, one former National Security Advisor, the Deputy Director of Central Intelligence and his predecessor, the CIA General Counsel and his predecessor, and other Executive branch officials. While this testimony was not public, it remains part of the committee's legislative record.

A second aspect of the record involves the confirmation hearings for a new DCI, where Mr. Gates and then Judge Webster made very strong oversight commitments in response to close questioning by the committee.

A third aspect of the record commenced following Judge Webster's confirmation when the committee spent many hours over several meetings to develop a set of recommendations for immediate action by the Executive branch on oversight under current law. It was anticipated at that time that this might also serve as the basis for further legislation. We sent these recommendations to Frank Carlucci, then the President's National Security Adviser, on July 1, 1987. This led to consultations with the Administration on a new Presidential directive, which contains many of the provisions of the pending bills. That Presidential directive was issued. There was an exchange of letters between this committee and the President, and let me say, I think there was much to commend in those procedures which were adopted by the Administration and I personally appreciated the spirit of the consultations with us at that time. I think the expression of support for these principles and the letter from the President to this committee, and in the directives adopted by the Administration and by the President have gone a long way in the right direction.

During the same period, the fourth aspect of the record unfolded across the Hill as our House colleagues introduced and held hearings on legislative proposals covering the same issues. We have invited, as I said, Chairman Stokes and Mr. McHugh here today so that we can benefit from their own exhaustive work on the House side.

Finally, of course, the year-long work of the special Iran-Contra Committee is part of our record. The eleven members of the Senate Committee included 4 members of the Intelligence Committee—Vice Chairman Cohen, Senator Nunn, Senator Hatch, and myself. Through this overlapping arrangement, which included significant involvement by committee staff as well, the Intelligence Committee was able to take full advantage of the deliberations of the Iran-Contra committees.

In order to receive its final recommendations, we postponed hearings on the pending bills until after the Iran-Contra report was approved. Then we immediately began this final phase of our work with a public hearing on November 13th, where the sponsors testified on these bills, a closed hearing on November 20th, where Judge Webster testified on the practical impact of these bills on the Intelligence Community. We have also been consulting widely with former senior officials and experts in intelligence law.

So, the hearings today and the hearings which will continue into next week bring to fruition the exhaustive study of the need for changes in the current oversight statutes. Indeed, few issues have receive such detailed consideration by so many people over so great a period of time prior to final mark-up. After these final hearings, the committee should be fully prepared to move to report legislation to the full Senate and placed on the calendar for Senate action early in the next session of 1988. Our goal is to have that legislation ready so that it can be one of the first items that the full Senate will be able to consider when we come back next year.

So, at this time I'd like to ask the Vice Chairman if he has any opening comments that he would like to make or any additional comments, and other members of the committee as well, before we hear from Mr. Cooper.

[Prepared statement of Senator Boren follows:]

PREPARED STATEMENT OF HON. DAVID BOREN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Today's hearing on S. 1721 and S. 1818 is the culmination of a lenthy and comprehensive review and analysis by the Senate Intelligence Committee of possible changes in the intelligence oversight statutes. The current phase of that review, which we expect will conclude with the mark-up of legislation, began over a year ago, on December 1, 1986, when the Committee initiated its preliminary investigation of the Iran-Contra matter.

It is important to note, however, that even before that date the Committee had continuously analyzed the issues raised by the ambiguities in the applicable statutes. In fact, consideration of these issues dates back to 1981, almost immediately after enactment in 1980 of the Intelligence Authorization Act for Fiscal Year 1981 which established the essential features of the present oversight process.

The 1980 legislation, which was originally reported and passed by the Senate as the Intelligence Oversight Act of 1980, made two fundamental changes in the statutory framework for intelligence oversight. First, it modified the Hughes-Ryan Amendment of 1974 to confine notice of Presidential findings for CIA covert action to the two Intelligence Committees. This reduced the number of committees notified of covert action findings from eight to two.

Second, the 1980 legislation added a new Section 501 on congressional oversight to the National Security Act of 1947. Section 501 established comprehensive oversight procedures for all departments, agencies, and entities of the United States engaged in intelligence activities. It required that the two Intelligence Committees be kept fully and currently informed of all intelligence activities, including significant anticipated intelligence activities. It also provided that when the President determined it was essential to meet extraordinary circumstances affecting vital US interests, prior notice could be limited to eight Members of Congress -- the Chairmen and Vice Chairmen of the Intelligence Committees, the Speaker and Minority Leader of the House, and the Majority and Minority Leader of the Senate.

Moreover, Section 501 was deliberately written with some ambiguity as a means of reaching agreement with the Executive Branch. As a result, for example, the requirement for prior notice of covert action, to the committees or to the group of eight, was legally qualified by two limitations that appear at the beginning of subsection 501(a) -- referred to as "preambular clauses." The general reporting requirements were imposed "to the extent consistent with due regard" for the constitutional authorities of the executive and legislative branches and "to the extent consistent with due regard" for the protection of classified information and intelligence sources and methods from unauthorized disclosure.

The original Hughes-Ryan amendment of 1974 placed no such limitations on its requirement for notice of CIA covert action "in a timely fashion." Therefore, in order to preserve the full force of the Hughes-Ryan notice requirement for the two Intelligence Committees, the authors of the 1980 statute added subsection 501(b) which was not limited by the preambular clauses. This subsection said that the President must report to the Intelligence Committees "in a timely fashion" if prior notice is not given under subsection (a) and must explain the reasons for not giving prior notice.

Almost immediately after the 1980 law was enacted, the Committee began to examine its meaning and application. The first occasion to do so in 1981 was the confirmation hearing for William Casey as DCI. Mr. Casey was asked specifically about his intentions in the area where the statute left some ambiguity about notice of covert action. He replied that he intended "to comply fully with the spirit and the letter of the Intelligence Oversight Act." He also noted that there were "reservations...that relate to the President's constitutional authority." Mr. Casey went on to add:

> "I cannot conceive now of any circumstances under which they would result in my not being able to provide this committee with the information it requires. I would obviously have to be subject to and discuss with the President any particular situations which I cannot now foresee, and I would do that in a way that this committee would know about." Nomination of William J. Casey, Hearing before the Senate Select Committee on Intelligence, January 13, 1981, p. 25.

Unfortunately, Director Casey did not fulfill this commitment when the President decided to withhold notice of the Iran arms sale finding from the Congress for eleven months.

Early in 1981, the Administration agreed to consult the Committee on any changes that might be proposed in the Executive Order on intelligence activities. This led to formal consultation on specific oversight issues addressed in Executive Order 12333, issued by President Reagan on December 4, 1981. The previous order issued by President Carter in 1978 had contained a section on congressional oversight similar to what became the language enacted by statute in 1980. The Reagan order deleted this section and substituted a provision requiring compliance with the 1980 statute. Executive Order 12333, Sec. 3.1.

As a result of Committee consultation in 1981, Executive Order 12333 added a provision not included in the previous order to fill a gap in oversight law. The Hughes-Ryan Amendment required a Presidential finding for CIA covert action, but not for covert action by other parts of the government. This gap was thought to have been closed by a new Executive order provision stating that the finding requirement of Hughes-Ryan "shall apply to all special activities as defined in this Order." Executive Order 12333, Sec. 3.1. However, as events later proved, the fact that this provision was contained in an Executive order, but not in the statute, presented an opportunity for abuse.

The Committee was also consulted on revisions in the definition of "special activities" which permitted operations inside the U.S. in support of "national foreign policy objectives abroad" and which added language excluding operations "intended to influence United States political processes, public opinion, policies, or media." Executive Order 12333, Sec. 3.4(h).

S. 1721 draws directly on these deliberations in 1981. It would incorporate into the oversight statute the Executive order requirement of a Presidential finding for special activities by any part of the government. And it adopts the essential features of the definition of "special activities," including the ban on operations to influence domestic US politics or media.

The cooperation between the Committee and the Executive branch in developing Executive Order 12333 reflected a commitment on both sides to working out any problems with the oversight procedures by mutual accomodation. A Committee report to the Senate on September 23, 1981, included as an ppendix a summary of the legislative history of modification of the Hughes-Ryan Amendment. It cited the floor statement by the sponsor of the 1980 legislation, Senator Huddleston, that "the only constitutional basis for the President to withhold prior notice of a significant intelligence activity would be exigent circumstances when time does not permit prior notice." S. Rep. No. 97-193, pp. 31-34.

It has become clear as a result of the Iran-Contra affair, however, that the Executive branch does not agree with the intent of the sponsor of the oversight law. Instead, the Justice Department has asserted the authority to withhold prior notice from even the group of eight leaders on the grounds of protecting secrecy. In addition, the Department has construed the "timely" notice provisions of the law to permit the President to withhold notice indefinitely.

These problems did not become apparent in the early 1980s, when the Committee was able to report that it "has received detailed reports and has heard testimony on covert action programs before implementation, and has actively monitored the progress of those programs once launched. Certain covert action programs have been modified to take into account views expressed by the Committee." S. Rep. No. 98-10, p. 2. (Emphasis added.) In this period, the Administration was able to comply fully with the prior notice provisions of the oversight statutes, and operations clearly benefited from that consultation.

During 1983-84, problems with the Nicaragua covert action program led to a reassessment of covert action oversight procedures. In 1983 the Congress placed a $24 million ceiling on funds available for the Nicaragua covert action program in fiscal year 1984. Describing the events that led up to this action, including a Committee requirement that the Administration issue a new Presidential Finding, the Committee explained the distinction between the powers of the Congress to appropriate funds and to obtain information and the power of the Executive to initiate operations:

> "In this connection, it should be noted that, while the Committee may recommend whether or not to fund a particular covert action program and the Congress, pursuant to its power over appropriations, may prohibit such expenditures, the initiation of a program is within the powers of the President. The Committee is entitled by law to be informed of the President's Finding authorizing such an action in advance of its implementation and to offer its counsel, but does not have the right to approve or disapprove implementation of the Finding." S. Rep. No. 98-655, p. 6.

This analysis of the constitutional powers of the respective branches continues to be the basis for the Committee's current consideration of S. 1721 and S. 1818.

In early 1984, the mining of Nicaraguan harbors disrupted the oversight relationship and led to the development of formal procedures to clarify reporting obligations. On June 6, 1984, Director Casey, with the approval of the President, signed a written agreement with the Committee setting forth procedures for compliance with the statutory requirements. The Committee summarized them in a report to the Senate:

> "A key component of the agreement that ultimately was achieved concerned recognition by the Executive branch that, while each new covert action operation is by definition a 'significant anticipated intelligence activity,' this is not the exclusive definition of that term. Thus, activities planned to be undertaken as part of ongoing covert action programs should in and of themselves be considered 'significant anticipated intelligence activities' requiring prior notification to the intelligence committees if they are inherently

> significant because of factors such as their political sensitivity, potential for adverse consequences, effect on the scope of an on-going program, involvement of U.S. personnel, or approval within the Executive branch by the President or by higher authority than that required for routine program implementation." S. Rep. 98-665, pp. 14-15.

S. 1721 builds directly upon the deliberations in 1984 by specifying in statute the requirement to report significant changes in covert actions under previously approved findings. The procedures developed in cooperation with the CIA in 1984 provide a substantial basis for the legislative history of this provision.

Subsequent experience indicated, according to the Committee's 1984 report, that "further steps were necessary to ensure that delays not inadvertently result in failure to notify the Committee prior to implementation of significant activities. The Chairman and Vice Chairman called this matter to the attention of the DCI, and he agreed to the establishment of specific time intervals for the notification process." S. Rep. 98-665, p. 15, note 4. This was the genesis of the the concept in S. 1721 and S. 1818 of notice within a fixed time period, such as 48 hours.

In the 99th Congress, the Committee and the DCI further refined these procedures. An addendum signed in June 1986 provided, for example, that advisories to the Committee would describe "any instance in which substantial nonroutine support for a covert action operation is to be provided by an agency or element of the U.S. Government other than the agency tasked with carrying out the operation, or by a foreign government or element thereof." Nomination of William H. Webster, Hearings before the Senate Select Committee on Intelligence, 1987, pp. 52-54.

The full texts of the 1984 agreement and the 1986 addendum appear in the hearings on Judge Webster's nomination as DCI in 1987. Both the original agreement and the addendum contained statements, insisted upon by the Executive branch, that the agreed procedures were "subject to the possible exceptional circumstances contemplated" in the 1980 oversight statute. Thus, they had neither the status of law nor the force of an unambiguous commitment. The problems associated with this fact became manifest in the Iran-Contra affair.

Following public disclosure of the Iran arms sales in November 1986, the Committee began a thorough review of how the laws and procedures for covert action might have been violated, disregarded or misinterpreted. Director Casey testified initially on these issues on November 21, 1986. After the Attorney General's announcement of November 25, 1986, disclosed the diversion of Iran arms sale proceeds to the Contras, the

Committee initiated a formal preliminary investigation which began on December 1, 1986, and was completed with a public report on January 29, 1987, to the new Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition. S. Rep. No. 100-7.

The Committee's preliminary inquiry examined in depth the circumstances in which the statutes, Executive orders, and procedures for covert action approval and oversight were interpreted and applied in the Iran-Contra affair. Witnesses who discussed these issues included the Secretaries of State and Defense, the Attorney General, the President's Chief of Staff, one former National Security Adviser to the President, the Deputy Director of Central Intelligence and his predecessor, the CIA General Counsel and his predecessor, the CIA Deputy Director for Operations, the Chief of the CIA Central America Task Force, the CIA Comptroller General, the CIA Inspector General, the Assistant Secretary of Defense for Latin American Affairs, the Assistant Secretary of Defense for International Security Affairs, and other Executive branch officials. While this testimony was not public, it remains part of the legislative record of the Committee's consideration of S. 1721 and S. 1818.

The Committee's preliminary report identified key factual issues that needed to be addressed by the Select Iran-Contra Committee, whose ten members included four senior members of the Intelligence Committee -- the Chairman, the Vice Chairman, and Senators Nunn and Hatch. Through this overlapping arrangement, which included significant involvement by Committee staff as well, the Intelligence Committee was able to benefit throughout the year from the findings and deliberations of the Iran-Contra Committee.

At the outset, however, it became clear from the Intelligence Committee's intensive preliminary Iran-Contra investigation that significant changes were required in the covert action oversight framework. Accordingly, the Committee discussed these issues at the hearings on the nomination of Robert Gates as DCI in February, 1987. Nomination of Robert Gates, Hearings before the Senate Select Committee on Intelligence, 1987. After his nomination was withdrawn, the Committee again raised these issues with Judge William H. Webster at his confirmation hearings as DCI in April, 1987.

Under questioning from Committee members, Judge Webster agreed that Presidential findings for covert action should be in writing and should not be retroactive. He also agreed that covert action by components of the government other than the CIA, such as the National Security Council staff, should be reported to the Intelligence Committees in the same manner as CIA operations. Most importantly, he agreed that he would recommend to the President against withholding notification under any but the most extreme circumstances involving life and death and then only for a few days. Nomination of William H. Webster, Hearings before the Senate Select Committee on Intelligence, 1987, pp. 64, 68-69, 158.

At the same time as the Iran-Contra Committee began its hearings, the Intelligence Committee proceded to develop a set of recommendations for immediate action by the Executive branch under current law that might also serve as the basis for legislation. At meetings in June, 1987, the Committee, after much discussion and detailed deliberation, approved a letter to the President's National Security Adviser, Frank Carlucci, setting forth detailed proposals for improved covert action approval and reporting procedures. These later became essential features of S. 1721 and S. 1818. The President's response to that letter on August 7, 1987, was printed in the Congressional Record when S. 1721 was introduced on September 25, 1987.

The Committee's letter of July 1, 1987, to National Security Adviser Carlucci recommended that covert action approval and reporting procedures ought to incorporate the following points, which are key provisions of S. 1721 and S. 1818:

-- In all cases there shall be a finding by the President prior to the initiation of any covert action. No finding may retroactively authorize or sanction any covert action not undertaken pursuant to, and subsequent to, a finding specifically approved by the President.

-- To ensure accountability and to provide unambiguous direction for actions taken within the Executive branch, there will be no "oral" findings unless the President determines that immediate action is required of the United States to deal with an emergency situation affecting vital U.S. interests, and time does not permit the drafting of a written finding. In these circumstances, the "oral" finding shall be immediately reduced to writing and signed by the President. The written finding shall include the President's reasons for first proceeding with an "oral" finding.

-- Each finding approved by the President shall specify any and all entities within the Executive branch that will fund or otherwise participate in any in carrying out the activities which are authorized, and shall set forth the nature and extent of such participation. The President shall be responsible for reporting all findings to the Intelligence Committees, regardless of which entity or entities within the Executive branch are designated to participate in the activity in question. At the time such reports are made, the

President shall also identify to the Committee any third country and, either by name or descriptive phrase, any private entity or person, which the President anticipates will fund or otherwise participate in any way in carrying out the activities which are authorized and shall set forth the nature and extent of such participation. Any changes in such plans or authorizations shall be reported to the Intelligence Committees prior to implementation.

-- Where the President determines to withhold prior notice of covert actions from the two Intelligence Committees, such prior notice may be withheld only in accordance with specific procedures. Such procedures shall, at a minimum, require that the President, or his representative, shall, in all cases without exception, notify contemporaneously, and in no event later than within 48 hours, the Majority and Minority Leaders of the Senate and the Speaker and Minority Leader of the House, and the Chairmen and Vice Chairmen of the two Intelligence Committees of the existence of the finding, which notification shall include a summary of the actions authorized pursuant thereto and a statement of the reasons for not giving prior notice.

The Committee's dialogue with the Administration, through National Security Adviser Carlucci, did not result in full agreement on new Executive branch procedures. These extensive consultations did, however, contribute to the substantive provisions of a new National Security Decision Directive on Special Activities (NSDD 286) issued by the President to clarify the rules by which covert actions are reviewed, approved, and reported to Congress. As a result, because much of the NSDD was developed in close consultation with the Committee, many of its provisions are contained in S. 1721 and S. 1818.

This can be illustrated by comparing several provisions of the bills and the Presidential directive:

-- S. 1721 and S. 1818 require that findings be in writing and cannot be made retroactive. S. 1721 provides that findings may not violate existing statutes. Similar requirements are contained in the NSDD.

-- S. 1721 and S. 1818 make clear that a Presidential finding must be obtained before any department, agency, or other entity of the U.S. Government can conduct a special activity. The Presidential directive affirms this principle.

-- S. 1721 requires that the Intelligence Committees be informed when a special activity involves another U.S. government agency or a third party who is not under the supervision of a U.S. government agency. The NSDD requires that these issues be addressed in a statement accompanying the finding.

Of course, however, a Presidential directive is not the same as a statute and can be changed or waived without warning by another President. Indeed, when the President's Chief of Staff, Donald Regan, was asked during the Committee's preliminary Iran-Contra inquiry about the previous NSDD procedures for approval of special activities, in effect when the Iran arms sales were approved, he professed ignorance of that NSDD. S. 1721 and S. 1818 would ensure that the requirements put in place by the Presidential directive cannot so readily be ignored or set aside in the future.

In the consultations leading to the NSDD, the Committee and the Administration were unable to reach agreement on a requirement that the Intelligence Committees, or the group of eight leaders, be informed of covert actions within 48 hours of their approval by the President. The NSDD requires the National Security Planning Group to reevaluate at least every 10 days a decision to delay congressional notification of a given finding. While the rationale may be to ensure that the delay will be kept to the absolute minimum length of time, the procedure contemplates that notice may be withheld indefinitely so long as NSPG members agree.

Thus, the NSDD appears to conflict with the current oversight statute which, in subsection 501(b) of the National Security Act, requires notification "in a timely fashion" and does not permit such indefinite delay. The differences of opinion between the Executive branch and Members of Congress over the meaning of term "timely" have demonstrated the necessity for legislation to clarify the legislative intent.

All these issues were fully considered at great length by the Intelligence Committee and the Iran-Contra Committee in the months leading up to the introduction of S. 1721 and S. 1818 and the approval of nearly identical Iran-Contra Committee recommendations. Much of the same ground covered in the Intelligence Committee's closed hearings in December, 1986, was covered again in the public Iran-Contra hearings and report in 1987. The witnesses discussed not only the facts of the Iran-Contra affair, but also the way covert action approval and oversight procedures were applied or, in many cases, misapplied. Accordingly, the exhaustive work of the special Iran-Contra Committee also serves as a part of the legislative record of S. 1721 and S. 1818.

And the work of the special Iran-Contra Committees was certainly significant. The staffs of the House and Senate Committees reviewed more than 300,000 documents and interviewed or examined more than 500 witnesses. The Committees held 40 days of joint public hearings and several executive sessions. The joint report of the Committees is over 690 pages long, including the minority report and supplemental and additional views of individual members.

The following recommendations from the joint report of the Iran-Contra Committees are reflected in S. 1721:

> "1. Findings: Timely Notice
>
> "The Committees recommend that Section 501 of the National Security Act be amended to require that Congress be notified prior to the commencement of a covert action except in certain rare instances and in no event later than 48 hours after a Finding is approved. This recommendation is designed to assure timely notification to Congress of covert operations.
>
> "Congress was never notified of the Iranian arms sales, in spite of the existence of a statute requiring prior notice to Congress of all covert actions, or, in rare situations, notice 'in a timely fashion.' The Administration has reasoned that the risks of leaks justified delaying notice to Congress until after the covert action was over, and claims that notice after the action is over constitutes notice 'in a timely fashion.' This reasoning defeats the purpose of the law.
>
> "2. Written Findings
>
> "The Committees recommend legislation requiring that all covert action Findings be in writing and personally signed by the President. Similarly, the Committees recommend legislation that requires that the Finding be signed prior to the commencement of the covert action, unless the press of time prevents it, in which case it must be signed within 48 hours of approval by the President.
>
> "The legislation should prohibit retroactive Findings. The legal concept of ratification, which commonly arises in commercial law, is inconsistent with the rationale of Findings, which is to require Presidential approval before any covert action is initiated....

"3. Disclosure of Written Findings to Congress

"The Committees recommend legislation requiring that copies of all signed written Findings be sent to the Congressional Intelligence Committees....

"4. Findings: Agencies Covered

"The Committees recommend that a Finding by the President should be required before a covert action is commenced by any department, agency, or entity of the United States Government regardless of what source of funds is used....

"5. Findings: Identifying Participants

"The Committees recommend legislation requiring that each Finding should specify each and every department, agency, or entity of the United States Government authorized to fund or otherwise participate in any way in a covert action and whether any third party, including any foreign country, will be used in carrying out or providing funds for the covert action. The Congress should be informed of the identities of such third parties in an appropriate fashion....

"7. Presidential Reporting

"The Committees recommend that consistent with the concepts of accountability inherent in the Finding process, the obligation to report covert action Findings should be placed on the President....

"15. CIA Inspector General and General Counsel

"The Committees recommend that a system be developed so that the CIA has an independent statutory Inspector General confirmed by the Senate, like the Inspectors General of other agencies, and that the General Counsel of the CIA be confirmed by the Senate....

"18. Findings Cannot Supercede Law

"The Committees recommend legislation affirming what the Committees believe to be the existing law: that a Finding cannot be used by the President or any member of the executive branch to authorize an action inconsistent with, or contrary to, any statute of the United States." S. Rep. No. 100-216, pp. 423-426.

Pursuant to the terms of S. Res. 23, and in order to receive the final recommendations based on the extensive work of the Iran-Contra Committee, the Intelligence Committee postponed hearings on the specific proposals contained in S. 1721 and S. 1818 until after final approval of the Iran-Contra Committee's Report in November, 1987. Thereafter, the Intelligence Committee immediately began the final phase of its work on oversight legislation. To date this has included a public hearing on November 13, 1987, where the sponsors of legislation in this area testified on their respective bills, and a closed hearing on November 20, 1987, where DCI William Webster testified on the practical impact of the bills on the intelligence community.

At the same time, the Committee has been consulting widely with knowledgable people, including former senior U.S. Government officials, experts in intelligence law, and Executive branch representatives. Committee staff have met personally with over two dozen experts who have provided valuable assistance in helping to evaluate and possibly refine the language of S. 1721 and S. 1818, and results of that process have been made available through their staff to all members of the Committee.

Therefore, the hearings today and next week are the culmination of a long and exhausive process of review and analysis of the need for specific changes in the current oversight statutes. That process extends back to the very beginning of the Committee's experience under the present law. It has taken into account not only the lessons of the Iran-Contra affair, but also the concerns and expertise of current and former policymakers and intelligence officials who were not involved in the Iran-Contra events. Indeed, few issues have received such detailed consideration by so many people over so great a period of time prior to final mark-up. Thus, after these final hearings, the Committee should be fully prepared to move to report legislation that can be on the calendar for Senate action early in the next session in 1988.

Senator **Cohen**. Thank you, Mr. Chairman. I want to thank you for your comment about the extent of the analysis that has gone into the proposed legislation. I might point out that Mr. Cooper, a young man that I think all of us hold with a good deal of admiration for his talents and also his testimony during the Iran-Contra affair, really may be, said to have been, in part, the genesis of this legislation. By revealing the Administration's interpretation of the language of timely notice, that Mr. Cooper caught our attention that something was fundamentally wrong. And I'd like to take about 4 or 5 minutes, Mr. Chairman, to outline what I believe to be the constitutional objections that were raised at this legislation.

The principle section is 503(c), which requires the President, without exception, to advise Congress of covert actions he has approved or undertaken within 48 hours of approval of such actions. He may limit that notice to a group of only 8 congressional leaders—the group that we refer to as the Gang of Eight, if he chooses. But, there are no circumstances recognized within the text of the bill which would permit the President to withhold notice altogether for more than 48 hours.

Now, the Administration has argued there must be greater flexibility for the President. There will be occasions when the President will not want to comply with this requirement and to require him by statute will, on occasions, hamper him from carrying out his constitutional responsibilities as the Commander-in-Chief, and the principal arbiter and executor of U.S. foreign policy.

I'd like to just take a few moments to examine that argument. The bill permits the President to initiate covert action without advising the Congress, so long as notice is given within that 48 hour period. Moreover, it makes clear that congressional approval is not required either to initiate or to continue a covert action. So, I think we have to be clear on that point. The bill does not prohibit the President from acting. The question is how providing notice to Congress within 48 hours of authorizing a covert action would interfere with the execution of actions which have already been initiated by the President.

Now, the concern seems to be that notice to the Congress, even the so-called Gang of Eight, inevitably increases the risk that that activity will be disclosed, that there will be lives at stake, or that the success of the enterprise is critical to the nation's security and the President could not take the risk of notifying even a limited number of congressional representatives. And, to require by statute such notice thus, would inevitably interfere with the execution of the President's constitutional responsibilities.

First, let me approach it on a purely practical level, I reject the notion that security considerations themselves would support this contention. I think Congress has demonstrated that it can keep secrets at least as well, and I would say far better, than the executive branch and those outside the government who are planning and executing covert actions. Including 8 members of the congressional leadership within the circle of those who have to know that such activities have been initiated does not significantly increase the risk that those activities will be disclosed. Senator Boren and I had a meeting just yesterday, I believe, with a former deputy director of the CIA, and we put the question to him, in all of his years of experience was he aware of any time that a covert action had been compromised by notice to Members of Congress, and the answer was no.

But, I want to go on, Mr. Chairman, and state that I emphatically reject the notion that the constitutional responsibilities of the Congress could be so easily overridden by executive branch concerns for security. I think covert actions raise serious foreign policy and defense concerns which are every bit as important to Congress in terms of its constitutional responsibilities to enact laws and appropriate funds as they are to the satisfaction of the executive branch responsibilities. These are not areas that the President exercises exclusive constitutional power. In fact, I think leading constitutional scholars have advised the Congress that covert action is constitutionally different from intelligence collection, that Congress has a clear authority to regulate this exercise of governmental power.

I think equally fundamental, the Constitution contemplates a system of checks and balances which in the end brings about good government. But in the case of covert actions—and, I believe this is something that Senator Murkowski was touching upon—in the case of covert actions which are planned and executed in secret without U.S. involvement ever being publicly acknowledged, the system of checks and balances contemplated by the Constitution is particularly susceptible to breakdown. Congress has been willing in the past to make some concessions to preserve necessary secrecy, but it is not prepared to accept a system which allows the executive branch to dictate when Congress will be consulted and when it won't be.

Because this, in effect, is what the Administration is arguing when it argues that a requirement of notice of covert actions may, under some circumstances, be unconstitutional and that it would favor an explicit recognition in the law that the President may withhold notice of covert actions, either by citing his constitutional prerogatives or by carving out a specific statutory exception.

But, I don't believe for the reasons I have already stated, that this is good government, or that it is what the Constitution contemplates. If, indeed, the President has a constitutional right not to comply with a statutory requirement to provide information to the Congress, then let him assert that right if he chooses. But why should Congress recognize such a right if we don't believe that it exists? Indeed, if the Constitution does provide for it, there is nothing that Congress can do in statute to alter such rights, either to enhance them or to remove them.

But the Administration continues to argue that if we do not recognize this possibility in statute, then we will, in effect, be forcing the President to violate a statute in order to assert his constitutional prerogatives. And that is precisely the point. We want the President to comply with the law. If he chooses not to comply, asserting his own view of the constitutional responsibilities, so be it. This is not a criminal statute. There are no penalties attached to noncompliance. To be sure, there may be political costs, and there may be costs in terms of continuing congressional support for the program. The extent of that cost will likely be proportional to the degree of political acceptance of the President's actions.

But, if one returns to the legislative history of the existing oversight statute, one finds that these very same points have been discussed over and over. In the final analysis, in order to enact legislation without provoking a veto in the past, Congress expressly recognized the constitutional prerogatives of the President, that he had the ability to withhold prior notice of covert actions if he chose to do so. When he did so, he was obligated by the law to provide notice in a "timely" manner, a phrase which was left undefined. And this formulation was developed with the intention of providing "flexibility" in the statutory framework, anticipating that it would be implemented in a spirit of comity and cooperation between the branches.

But then, we found in the Iran-Contra affair that we had the Administration contending that whatever problems Congress might have had with the entire venture, the failure to notify Congress did not, in fact, violate the letter of the intelligence oversight statutes. And, indeed, the Administration, I think, could make a case—an arguable case—that it did not. The statute allows the President to withhold prior notice and to report thereafter in a timely manner, which the Department of Justice has interpreted as meaning whenever the President sees fit. Congress is thus left standing meekly in the corner, angry that its intentions have been blatantly disregarded, but unable to argue conclusively that the oversight statutes have even been violated.

And, so, this experience has convinced me the system has to be changed, and we have to clarify exactly what is meant by timely notice. And a decision to withhold notice of such actions from Congress should give the President pause under our statute. We ought not to make it easy for him to keep us in the dark by providing loopholes in the statutory language large enough to sail the Erria through.

I have a number of other points to address. I think you addressed several of them in your remarks, Mr. Cooper, but let me conclude by just making one point. I have been under the impression—perhaps misapprehension—that there's an effort underway on the part of the Administration to stall committee action on this bill before the session concludes. The committee has been repeatedly advised that certain cabinet officials have a burning desire to testify before the committee as to the constitutionality of this bill. And, I have had conversations with certain of those cabinet officials to learn that they didn't even know of the existence of the legislation—not to mention expressing any burning desire to testify as to its contents. Now it's clear to me that the Administration opposes the requirement of 48-hour notice. There is no doubt in my mind they will continue to oppose it. There's little doubt in my mind that if we pass the bill the President will veto it. So be it. We'll see whether or not Congress has the will to assert its own constitutional responsibilities. But, in my judgment, Mr. Chairman, I think we should move forward, after listening to Mr. Cooper speak on behalf of the Department of Justice, whatever other Administration witnesses can testify next week and then move very expeditiously to a mark up of the bill. And, I imply from your remarks that that's precisely what you intend to do.

Chairman **Boren**. Well, thank you very much, Senator Cohen. It certainly is what the committee intends to do. We have been at this matter for a long time. We've had a very thorough study. We have had requests in to the members of the Administration, and, of course, we want to write the best possible legislation. We want the Administration to have an opportunity to have the maximum input possible, the benefit of their best advice, but at the same time we simply cannot prolong these deliberations forever. It is our intention to proceed with the markup expeditiously and, as I've said, our goal and our intention is to have legislation on the Senate calendar so that it can be one of the very first items considered by the full Senate next year. Senator Specter, any additional opening comments?

Senator **Specter**. Yes, Mr. Chairman, I would like to make an opening statement on the issue of constitutional law which I think might be helpful as Mr. Cooper presents his testimony.

By way of introduction, I share the concern that there not be exceptions as to what the President has to do by way of notification to Congress. The Intelligence Committee submitted a letter to the President after we considered the matter in some detail in the light of the sale of arms to Iran. When we got the reply from the President saying that he would give us notice in all but the most exceptional circumstances, it seemed to me that we were farther behind at that point than we were before we started the process. If we stood by and accepted the President's conclusion that he need not notify us in exceptional circumstances, then we would be confirming the authority which he had exercised on not notifying us on the sale of arms to Iran. I think as a matter of public policy that that is not acceptable.

Now, in terms of the constitutional issues, I think it might be worth just a moment or two to go into some of the legal aspects of this matter. I read your statement, Mr. Cooper, and I see the citations of authority in the memorandum which you have presented to us. You cite two cases, Curtiss-Wright Export Corporation, and Untied States versus Nixon. In my legal judgment they do not provide real authority and any significant authority for the propositions which you have asserted. I think it might be useful before coming to the question and answer session to give you my thought in terms of other cases in the field.

There are many cases which establish the joint authority of the President and the Congress with very substantial authority to the Congress in the field of foreign relations. I cite the most recent case, Japan Whaling Association versus American Catycon Society, a 1986 opinion. In short, the Supreme Court said we are cognizant of the interplay between these amendments and the conduct of this nation's foreign relations, and we recognize the premier rule which both Congress and the Executive play in this field. Their accord even puts Congress ahead.

When you take up the case which you cite of the United States versus Curtiss-Wright, that case had as its operative facts, a resolution of the Congress on which the President had acted. There the courts talk about the authority of the federal government in the field of foreign relations and says that the President is the sole organ of the federal government, but very much in a context of an agency relationship to carry out the activities of the federal government, i.e., leaving a very decisive role to the Congress.

Probably the most important statement of the interrelationship between Congress and the President on foreign affairs has been the opinion of Justice Jackson occurring in Youngstown Sheet and Tube. That opinion is cited repetitively in Supreme Court decisions and was really adopted as the major tenet for the decision of the Supreme Court in the case of Dames and Moore vs. Regan, a decision handed down in 1981. And it's worthwhile just to take a moment and to focus on that statement of law, because I believe it sets the constitutional parameters.

The Supreme Court said this: When the President acts in the absence of Congressional authorization, he may enter a zone of twilight in which he and the Congress may have concurrent authority or in which its distribution is uncertain. In such a case, the analysis becomes more complicated and the validity of the President's action—at least so far as separation of powers are concerned—hinges on a consideration of all the circumstances which might shed light of the views of the legislative branch toward such action, including congressional inertia, indifference or quiescence. Finally, when the President acts in contravention of the will of Congress, his power is at its lowest ebb and the court can sustain his actions only by disabling the Congress from acting upon the subject.

United States versus Nixon, the other case which you cite, is really no authority at all because obviously, as we all know, the court found against the President there. And, the comment that you refer to about national security secrets is really a throw-away line. The court is saying absent that kind of consideration, and not really dealing with the import should it be present. But, in United States vs. Nixon the court comes down very solidly, again referring to Jackson's concurring opinion, on the interdependence, autonomy and reciprocity of the interaction between the Executive and Legislative branch.

I'm not going to take up the time to cite any more cases, but in your statement, Mr. Cooper—and we'll have a chance to discuss this further—I would like your evaluation, the totality of the Supreme Court decisions, with emphasis on what I consider, just speaking for myself, to be the critical factual indicators, the potential advantage to the country in having the wisdom of Congressional insight especially of the leaders. We all know the role of the Congress in terms of public policy generally. We make that determination jointly with the President. We can overrule the President on his public policy if we override a veto. And similarly, the Congress has a substantial role not only in public policy but in foreign policy, and then the potential disadvantage of disclosures.

But, as we listen to the Justice Department and to your presentation this morning, I would be hopeful that we would be presented with some greater exposition of authority than simply Curtiss-Wright, which has not been the seminal law of this country on that sole organ line, contrasted with Jackson's opinion in Youngstown Sheet, and with the necessity for the interrelationship turning on the factual issues about advantages or potential disadvantages.

And, I regret taking up quite so much time, Mr. Chairman, but those are the parameters which I see. We got into it a little bit with Senator Rudman—not very much. But, these are really very important issues, and this may be the ony time we'll have for the Administration to present its views.

Chairman **Boren**. Well, thank you very much, Senator Specter, and I value the comments you've made. Obviously, as Mr. Cooper can tell, there's been a great deal of thought given to the legal and constitutional issues involved by the members of the committee. I think the kind of discussion and the issues which you've raised is the very kind of discussion that we should be having as we look at this legislation. I appreciate the contribution you've made this morning with your opening comments and with the legal analysis which you provided.

Senator Hecht, any opening questions?

Well, let me say, Mr. Cooper, we're very glad to have you with us this morning. As you know, we'll be hearing from others from the Administration as well, and I would echo what has been said by Senator Cohen. Those of us who had the responsibility of serving on the Iran-Contra Committee, of course, had an opportunity to hear your testimony at that time. We've all had an opportunity to observe your record, and whatever positions we may have on legal issues—and these are very important legal and constitutional issues—I think there is certainly a very shared feeling of respect for your integrity and for your professionalism. We value your input, and we welcome you to the committee. We will receive your testimony at this time.

STATEMENT OF CHARLES J. COOPER, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. **Cooper**. Thank you, very much, for that kind of welcome, Mr. Chairman and Mr. Vice Chairman, and Senator Hecht. It's a pleasure for me to be here to share with you our thoughts, our legal thoughts, our constitutional thoughts, on S. 1721, which of course relates to congressional oversight of intelligence activities. I was late in submitting my testimony, I apologize for that, apologize for the dislocation it may have caused. Because I was late though, I will present a little more than I might otherwise; however, I do plan to omit some of the passages that are not truly necessary to understanding our positions. And I will elongate in some of the areas where it occurs to me that questions have already been raised.

But before summarizing the serious constitutional issues that we think are raised by some of its provisions, a couple of its provisions, I should like to note that the Congress and the President share a common objective in this area: That is an effective, responsible intelligence capability and establishment. In our view, we regret to say, the provisions of the proposed bill, the narrow provisions that I will describe momentarily, do not advance this shared objective. We submit, however, on the other hand, that the President's procedures for approval, review, and notification of special activities, which he communicated to this committee in his letter to you, Senator Boren, of August 7th, do maintain the well established constitutional authority of both branches. To the extent that this committee has seen fit to incorporate some of those thoughts in the bill, obviously we will not be heard to complain. We think they are provisions that will strengthen our intelligence capability by rationalizing the process for making decisions and reviewing policies, thereby freeing both branches to pursue the important national goal of an effective, responsible intelligence service.

My prepared testimony summarizes some of the salient features of this bill, but you all know them much better than I do. I will go straight to what you've already identified as our primary constitutional concern, which arises from the requirement that absolutely every Finding be reported to the congressional intelligence committees within a fixed period of time. The proposed bill would require that notice in all cases be given within 48 hours of the time that a Finding is signed.

I want to emphasize that this Administration, like prior Administrations, believes that it is essential to cooperate and consult and to work with Congress in this area. Moreover, the President has recently reaffirmed his commitment to the current statutory scheme of prior notification and has made clear his desire and intention to cooperate with Congress in the field of foreign affairs.

While cooperation is the rule, we in the Department of Justice believe that there may be instances where the President simply must be able to initiate, direct, and control extremely sensitive national security activities and that this presidential authority is protected by the Constitution. S. 1721, by attempting to oblige the President under any and all circumstances regardless of how exigent, to provide information, notification to Congress of a covert—of any and all covert activities within a fixed period of time, would infringe on this constitutional prerogative of the President.

Our analysis on which we base these conclusions is set out in far greater detail in a memo that you, Mr. Vice Chairman, have made reference to, and of course this is a rather pale shadow of that work, but I will, if you permit, touch on some of the salient and essential bases for our constitutional conclusions.

First of course there is the text of the Constitution. Article 2, Section 1 provides that the Executive power shall be vested in a President of the United States America. This clause has long been understood by the Judiciary and prior congresses as well as all prior Presidents to confer on the President a plenary authority to represent the United States and pursue its interests outside of the border of the country, subject of course to the limits set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The comments that have been previously made about the foreign affairs power being a shared power are well taken. We do not in any way dispute that point. It is a shared power and I will elaborate further in due course.

There have been many situations throughout our history in which Presidents have believed themselves obligated to refuse to accede to a congressional request for information, the disclosure of which would impair that President's ability to discharge his constitutional obligations in the field of foreign affairs. These range from President Hoover's refusal to provide the Senate Foreign Relations Committee with letters concerning negotiation of the London

Treaty to President Eisenhower's refusal to turn over personnel information during Congressional investigations into the loyalty-security program. Moreover, on numerous occasions in our history, Congress itself has recognized that its power to obtain information from the Executive branch is not entirely absolute, particularly when it relates to a matter within the ambit of the President's foreign affairs powers.

James Madison, while a member of the House of Representatives, defended President Washington's decision to withhold from the House information relating to the negotiation of the Jay Treaty. Madison asserted that the Executive had a right to withhold information, when he conceived that, in relation to his own department, papers could not be safely comunicated. This congressional recognition of this essential privilege has continued into the modern era.

The Federal judiciary has likewise recognized the President's important powers in the area of foreign affairs. Here I will invoke the case that we have previously heard descriptions of, the Curtiss-Wright case. There the Supreme Court drew a sharp distinction between the President's relatively limited inherent constitutional powers to act in the domestic sphere, particularly vis-a-vis Congress, where the great bulk of constitutional domestic authority lies of course, and his much more far reaching discretion to act on his own constitutional authority in managing the external relations of the country. The Court emphatically declared that this discretion derives from the Constitution itself, and it stated a quote we have previously heard, but I think it does bear repeating. The President is:

> The sole organ of the Federal government in the field of international relations—a power which does not require a basis for its exercise an act of Congress.

Let me take this opportunity to address some of the questions that have been raised thus far. First the question whether or not this statement is dictum, and second the question of just how much the executive can load on the statement, because he can't load everything on it and he makes no claim to be able to do so. We think the statement is not dictum. It is certainly true, Mr. Vice Chairman, that the President there was able to rely not just on inherent powers but on an express delegation of congressional powers and therefore was at the epitome of his constitutional authority to act. As we have heard from Senator Specter, that delegation was challenged, its constitutionality was challenged, based upon a doctrine that no longer is followed by the Supreme Court, the delegation doctrine, which was outlined in the Panama Refining case and in the Schecter-Poultry case and some others. The claim was that the delegation itself was not subject to sufficient standards that had been previously outlined in the Supreme Court decisions. Based upon those cases, the delegation was very probably unconstitutional. But the Court did not decide that question because it didn't have to. Its point was, even if this delegation would otherwise be unconstitutional, if the standards would otherwise be inadequate, the President has his own authority in this area on which he and the Congress can rely when the Congress looks to him to make the kind of decisions that that particular statute required.

But even if you are right, and it is dictum, and would not therefore be entitled to a stare decisis kind of effect if this issue were before the Supreme Court, we think the dictum is accurate. It's accurate in this sense. It's accurate in the sense that the President does have a zone—we will undoubtedly disagree on what the boundaries of that zone are, but I doubt that we will disagree that he has a zone of inherent constitutional authority—wherein he cannot be regulated, wherein he has decisions that the Constitution obliges him to make. The American people look to the President to make those decisions; they do not and constitutionally cannot look to the Congress to make them. With respect to those decisions, the President obviously is the exclusive authority under the Constitution for the American people.

There are many areas in which the President has exclusive authority under the Constitution. He can receive ambassadors. There are no limits on his ability to receive ambassadors. He may negotiate treaties. He negotiates based upon his own judgments of what is in the national interest. Those judgments are influenced by Congress and well should be, and Congress is obviously free to attempt in every way to influence the types of treaties that he does negotiate and the terms on which he negotiates. But in the end the treaty that the President presents to the Senate for ratification will reflect what he in his best judgment thinks is appropriate. The Senate then has its authority to accept or reject it and that power is absolute. There is nothing that the President can do. The Senate can reject a treaty for a good reason or a bad reason or no reason at all, and there is nothing in the world the President or any other authority can do about it. So although this is a shared power, there is no question about it, but that does not change the fact that there is clearly an exclusive realm for the President.

In addition to these express realms that I have mentioned, there are some areas that are implied and have been recognized, I think, by the Supreme Court. One is the communicative area. The President does indeed represent the American people to foreign sovereigns. He speaks for the American people with foreign sovereigns. That is implied and I think that essentially is what this sentence in Curtiss-Wright means and we don't purport to load any more on it than that.

Senator **Cohen**. But you load more on it when in fact you maintain that as a result of the Curtiss-Wright decision the President can in fact undertake, initiate, and carry out a covert activity to achieve a foreign policy goal and make the exclusive judgment as to what is timely notice. It might be a week, it could be a year, it could be 15 months, and he would be the sole judge of when Congress is notified of that activity, and you sight U.S. v. Curtiss-Wright as support for that. You are loading quite a bit on.

Mr. **Cooper**. Well, I think that implicates an additional constitutional point. But let me first address the question of how much the President can rely on this in terms of his execution of covert operations. Covert operations are not all identical. Some of them implicate what we believe are the President's exclusive authorities. Now you previously, Mr. Vice Chairman, have made a distinction—and I know other scholars do—about the President's intelligence gathering function, which I think most scholars are agreed is within his exclusive realm because it tends very readily to flow from his power to receive ambassadors and to appoint ambassadors and otherwise to be the representative of the American people to foreign sovereigns.

And then on the other hand there are covert operations. Covert operations don't necessarily get the President outside of his exclusive presidential authority. They may, and most of them—at least the ones I am familiar with—implicate authorities of the Congress as well, areas that the Congress can well regulate. The President cannot, simply because it is simply a so-called a covert intelligence operation, transfer resources such as arms to foreign countries. The Congress has the authority to regulate international commerce, and I think its power to regulate international commerce would obviously be implicated by any such decision. That is true whether the decision is overt or whether it is covert. So that element of a covert operation would clearly implicate Congressional authorities.

I would, however, suggest that a covert operation, hypothetically speaking here, that was designed solely to free American hostages and did not involve anything like international commerce might well be within the President's exclusive presidential authority. The courts and most commentators have recognized that among his responsibilities in the area of foreign affairs are the protection of American citizens abroad. This is simply a power that Congress could not efficiently exercise. A President has the tools available to him to discharge that kind of a responsibility of our government to its constituents.

Senator COHEN. Are you suggesting that regulation embraces a notice requirement? In other words, Congress is regulating the president's ability to get hostages out of foreign countries by having 8 members notified that he is undertaking such a measure?

Mr. COOPER. Well, this is the long way of getting to what I think is indeed perhaps a much narrower debate, but which essentially comes down to the fact that when the President is making a decision that the Constitution obliges him to make in undertaking an action, whatever it is but particularly if it involves the national security-foreign affairs area, he is entitled under the Constitution to maintain the confidentiality of that decision, if to fail to do so in some way would in his mind jeopardize his ability to discharge that constitutional obligation. This is simply a commonplace statement of the foundation for the whole doctrine of executive privilege. On occasion, the ability of each branch to discharge its constitutional responsibilities may well require it to proceed confidentially, because in the judgment of that branch to fail to do so would represent risks to the success of a task important to the interests of the American people that simply cannot be run.

In the foreign affairs area, I think those concerns are at their zenith. The Supreme Court I think has recognized in the foreign affairs area that we have things such as state secrets. This gets to what would be my next point and the next case I cite in my testimony, United States versus Nixon, where the Supreme Court recognized the existence of an executive privilege, and it recognized, even though Senator Specter you are certainly correct, it did not in that case need to invoke the states secret prong or the foreign affairs/national security prong of executive privilege such as it is, but it did recognize that there are gradations in the strength of a President's claim of executive privilege and that they are at their zenith in the area of national security. That is not at all surprising in light of the fact that in that area perhaps more than any other, the consequences of failed operations can be extreme.

So the point really proceeds on two premises and they are that there are some areas of responsibility that are exclusively the President's and that with respect to all areas that he is responsible to the Constitution and to the American people, the Constitution recognizes his right to invoke the executive privilege if he deems that he has no other choice.

Senator COHEN. How are we to know whether it is a proper exercise of his exclusive powers if we're never told about it?

Mr. COOPER. Well, I don't make a defense of any kind of absolute executive privilege. The Supreme Court has rejected any such thing, and I think properly so. I don't think it is absolute either in terms of subject matters that it may cover or at least it is certainly not absolute in any and all circumstances. We know that from *United States vs. Nixon*. And I don't think it is permanent in its duration. I can't conceive of a situation where a President could responsibly conclude, and therefore consistently with the Constitution conclude, that this was an enterprise that could never be made known either to the public or certainly to the Congress. So I don't think that the executive privilege is that muscular.

I think it is an exaggeration, Senator Cohen, to say that we are suggesting or that the timely notice memo maintains that the President need disclose such activities or information only when he sees fit, though I guess I can see how one would read that memo that way.

Senator COHEN. Not the memo. I asked you, I think, during the hearings whether or not the President would be the sole determiner of what constituted timely notice. It might be a matter of days, I think we talked about, weeks, months, or years, to which you said yes.

Mr. COOPER. Yes, I remember that.

Well actually, my recollection is that when you put me to my toughest burden and you suggested forever or something close to it, I suggested that I resist, I pull back from that. It may well be—no, I do believe that the President is responsible to make that decision and I just don't think that it can be any other way, I am afraid.

Senator COHEN. What are the guidelines? No guidelines?

Mr. COOPER. Well, I think the guidelines are those that the Constitution places upon him, which we can discern from Supreme Court decisions and historical understandings of the nature of this power. I don't think that—we certainly do not submit to you that it is an absolute power, that it protects the President permanently from any kind of disclosure.

In fact on this very point, we know from *United States vs. Nixon* that over time the strength of the executive privilege does indeed erode. Whether or not, for example, former President Nixon—the Supreme Court recognized that former Presidents do not lose their privilege when they leave office—could successfully assert the privilege today is a very different question from whether he could successfully assert it back when he was in office shortly thereafter.

So we do know, this isn't a permanent kind of thing. But at least, at least insofar as an ongoing operation for example, to rescue hostages, is concerned, it seems to me that the President has to be able to weigh the consequences of disclosure against the very, very low prospect of an inadvertent disclosure beyond the charmed circle of individuals who are going to be permitted to have the information. The President is the only one, I think, who in the end can make that decision. He is the only one constitutionally obliged to make that decision and so he has to be the one ultimately accountable for that decision, as this President has been accountable for the decisions made in the Iran-Contra matter.

[Pause.]

Mr. Cooper. Let me skip through most of the discussion because I think we have touched upon these matters in even greater detail than in my testimony——

Chairman Boren. We will put your entire statement in the record in an orderly fashion.

[The prepared statement of Charles J. Cooper follows:]

Prepared Statement of Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

Mr. Chairman, Members of the Committee:

I am pleased to appear before you today to discuss the constitutional issues implicated by S. 1721, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice believes that this legislation, in its present form, could seriously impair the President's ability to discharge his important constitutional responsibilities in the field of foreign relations.

Before summarizing the serious constitutional issues raised by the bill, I should like to note that the Congress and the President share a common objective in this area: an effective, responsible intelligence capability and establishment. In our view, we regret to say, the bill fails to advance this shared objective. We submit, on the other hand, that the President's procedures for approval, review, and notification of special activities, which he communicated to this Committee by his letter of August 7, 1987, respect the well-established constitutional authority of both branches. They also strengthen our intelligence capability by rationalizing the process for making decisions and reviewing policies, thereby freeing both branches to pursue the important national goal of an effective, responsible intelligence service. ①

S. 1721 would repeal the Hughes-Ryan Amendment, which requires Presidential approval of covert actions by the CIA. In its place, the bill would institute a new presidential approval requirement, which would become Section 503 of the National Security Act of 1947. Proposed Section 503 would require that the President authorize all "special activities," or covert actions, conducted by any department, agency, or entity of the United States government. The Presidential approval would take the form of a "finding," which must be reduced to writing within forty-eight hours of the time that a decision regarding covert actions is made.

S. 1721 would also require that findings be in writing. In circumstances where time does not permit the preparation of a written finding prior to presidential approval, S. 1721 would require that a written finding be prepared "as soon as possible." In no event would S. 1721 permit the preparation of a written finding more than forty-eight hours after a Presidential decision had been made. The President already has adopted procedures, virtually identical to those set forth in the bill, to ensure that findings are committed to writing. Indeed, in his letter to Chairman Boren dated August 7, 1987, the President pledged that "[e]xcept in cases of extreme emergency," all national security findings will be in writing. Moreover, the President stated that if an oral directive is necessary, a finding will be "reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter."

Our primary constitutional concern with S. 1721 arises from the requirement that absolutely every finding be reported to the congressional intelligence committees within a fixed period of time. The proposed amendment would require that notice in all cases be given within 48 hours of the time that a finding is signed.

This Administration, like prior Administrations, believes it is important to work with Congress in this area. Moreover, the President recently has reaffirmed his commitment to the current statutory scheme of prior notification and has made clear his desire and intention to cooperate with Congress in the area of foreign affairs. While cooperation is the rule, the Department believes that there may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President, under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this constitutional prerogative of the President. As I am sure the members of the Committee are aware, issues of such constitutional gravity have implications far beyond the reporting requirements in this bill. Equally as important, such requirements raise important practical concerns about the United States' ability to operate an effective intelligence service. I am clearly not the best person to address those latter concerns.

I will not attempt to discuss all of the authorities and precedents relevant to our constitutional conclusion. Nevertheless, I do believe that it is important to discuss briefly some of the bases for our conclusion. First, of course, there is the text of the Constitution itself. Article II, section 1 of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of

America." This clause has long been understood to confer on the President a plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject of course to the limits set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. (E)

Since the beginning of the Republic it has been recognized by Presidents, Congress, and the Judiciary that the Constitution vests in the President broad and exclusive responsibilities in the field of foreign relations. This authority was first asserted by George Washington and acknowledged by the First Congress.

There have been many situations throughout our history in which a President has refused to accede to a Congressional request for information that he deems confidential. These range from President Hoover's refusal to provide the Senate Foreign Relations Committee with letters concerning negotiation of the London Treaty to President Eisenhower's refusal to turn over personnel information during Congressional investigations into the loyalty-security program. Moreover, on numerous occasions in our history, Congress itself has recognized that its power to get information from the Executive branch is not absolute, particularly when it relates to a matter within the ambit of the President's foreign affairs powers.

James Madison, while a member of the House of Representatives, defended Washington's decision to withhold from the House information relating to the negotiation of the Jay Treaty. Madison asserted that "the Executive had a right . . . to withhold information, when . . . [he] conceived that, in relation to his own department, papers could not be safely communicated." This Congressional recognition of the President's right to withhold information has continued into the twentieth century. CK

The federal judiciary has likewise recognized the President's important powers in the area of foreign affairs. In Curtiss-Wright, the Supreme Court drew a sharp distinction between the President's relatively limited inherent^constitutional powers to act in the domestic sphere and his far-reaching discretion to act on his own constitutional authority in managing the external relations of the country. The Court emphatically declared that this discretion derives from the Constitution itself, ck stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." ⑥

More recently, the Supreme Court again has emphasized that the President has broad powers in the area of foreign affairs. Moreover, the Court's reasoning indicates that this power will sometimes justify withholding information from the other branches of the government. In United States v. Nixon, the Court invoked the basic Curtiss-Wright distinction between the domestic and international contexts to explain its rejection of former President Nixon's claim of an absolute privilege to maintain the confidentiality of Executive branch communications. While rejecting his sweeping and undifferentiated claim of executive privilege as it applied to communications involving domestic affairs, the Court repeatedly stressed that military or diplomatic secrets are in a different category. The Court's opinion stated that the protection of such secrets is inextricably linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." Covert intelligence operations in foreign countries are among the most sensitive and vital aspects of the President's constitutional responsibilities in the field of foreign relations.

Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power.

Our view that the Constitution does not authorize these provisions of S. 1721 should not be misinterpreted as a denial that Congress has a legitimate role in the formulation of American foreign policy. But Congress in the performance of its legislative function does not require notification of virtually all intelligence activities within a fixed period of time after the President signs an order authorizing its initiation.

Even in cases in which it can be assumed that Congress has a legitimate legislative basis for the requested information, it does not follow that the President invariably should communicate findings to Congress within 48 hours of the time that they are signed. As President Tyler recognized in 1843, "[i]t cannot be that the only test is whether the information relates to a legitimate subject of [congressional] deliberation." A President is not free to communicate information to Congress if to do so would impair his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours could well frustrate the President's ability to discharge those duties. For example, it was absolutely necessary that the Carter Administration withhold from Congress information relating to Canada's involvement in the smuggling of six American hostages out of Iran. According to Admiral Stansfield Turner, who was Director of the CIA at the time, Canada made withholding notification to Congress a condition of its participation. Similarly, requiring the Executive branch to disclose all information requested by the intelligence committees could, under some circumstances, prevent the President from fulfilling his constitutional duties.

In recent hearings on a House bill that would have imposed a 48 hour reporting requirement on the President, several Congressmen argued that such legislation could be justified as an exercise of Congress' power to tax and spend. Their argument was that the power to appropriate or to refuse to appropriate funds includes the lesser power to appropriate funds subject to a condition, such as a reporting requirement. We readily acknowledge that Congress' appropriations power is exceedingly broad, and includes as a general matter the authority to attach conditions to appropriations. But it is not limitless. The fact is that Congress appropriates money for all government departments and agencies. It also appropriates all salaries for all federal employees in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' establishment through legislation of the various executive branch departments and its appropriation of money to pay the salaries for federal officials that Congress can constitutionally condition the creation of a department or the funding of an officer's salary on being allowed to appoint the officer. Acceptance of this understanding of the appropriations power would in effect transfer to Congress all powers of all branches of government. The framers' carefully worked out scheme of separation of powers, of checks and balances, would be rendered meaningless. Accordingly, however broad the Congress' appropriations power may be the power may not be exercised in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of the other branches.

There are two other provisions of S. 1721 which raise similar constitutional problems. Proposed Section 502 would require that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 502 contains only one exception to its absolute disclosure requirement; the Executive branch is granted authority to protect classified information relating to sensitive intelligence sources and methods. Proposed Section 503 has a similar provision requiring the Executive branch to disclose all information concerning covert actions that is requested by the intelligence committees. Proposed Section 503, however, is not tempered by the limited exception permitting the Executive branch to protect sensitive sources and methods. These virtually absolute disclosure requirements raise much the same concern as the 48-hour notice provision. Both purport to sharply reduce, and, in the case of covert operations, completely eliminate the authority of the Executive branch to withhold from Congress information relating to the discharge of its responsibilities in the field of foreign affairs, even when the release of such information would interfere with the President's ability to fulfill his constitutional duties.

The provisions of S. 1721 requiring that the President provide all information requested by the intelligence committees raise a separate constitutional concern, which I should discuss briefly. Many of the documents retained by the intelligence agencies may constitute interagency communications. Although disclosure of these documents might not impair directly the President's authority in the area of foreign affairs, we nevertheless believe that the Executive branch may legitimately refuse to provide these documents to Congress. The Supreme Court in the Nixon case recognized that there is a "valid need for protection of communications between high government officials and those who advise and assist them." While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decisions of the government.

Of course, the Executive branch will attempt to cooperate with Congress. In all but the most exigent circumstances, this cooperation will take the form of providing the information that Congress requests. We cannot agree, however, that a blanket requirement of disclosure in all cases is appropriate. The President must retain the discretion to withhold information when its disclosure would impair his ability to fulfill his own constitutional responsibilities.

In sum, then, S. 1721 raises a number of constitutional concerns. First, the requirement that the President, under all circumstances, report to Congress within 48 hours of the time that a finding is signed authorizing covert action unconstitutionally interferes with the President's foreign affairs powers. Likewise, the absolute requirement that the Executive branch provide all information requested by the intelligence committees may impede the President's ability to discharge his constitutional responsibilities in the area of foreign affairs. Moreover, the disclosure provisions purport to prevent the President from protecting confidential executive branch deliberations. These provisions attempt by legislation to alter the Constitution's allocation of powers among the institutions of our government. This simply cannot be done by legislation, regardless of whether the Executive branch concurs in the reallocation of power.

I thank the Committee for this opportunity to discuss our constitutional concerns and would be pleased to address any questions that you may have.

Mr. **Cooper.** Certainly, Mr. Chairman, and I appreciate that.

I do want to touch on this question, however, of the Congress' spending power, because in recent hearings on the House bill, which is very similar to the proposal we are discussing, and previously in the hearings thus far, arguments have been made to the effect that the Congress's tax and spend power, its appropriations power, is the authority available for the 48 hour notice requirement. The argument essentially is that the power to appropriate or to refuse to appropriate funds includes necessarily the lesser power to appropriate funds subject to a condition, such as a reporting requirement.

We readily acknowledge that Congress' appropriations power is exceedingly broad and includes as a general matter the authority to attach conditions to appropriations. But we do resist the proposition that it is without any limits. The fact is that Congress appropriates money for all government departments and agencies. It also appropriates all salaries for all federal employees in all three branches of government. But the fact that Congress appropriates money for the Army, we would submit, does not mean that it can constitutionally condition an appropriation on allowing its Armed Services Committees to have tactical control of the armed forces. Nor does it follow from Congress's establishment through legislation of the various executive branch departments and its appropriation of money to pay the salaries for federal officials that Congress can constitutionally condition the creation of a department or the funding of an officer's salary on being allowed to appoint the officer.

Our point is really is quite simple. Acceptance of these propositions, of this understanding of the appropriations power, would in effect transfer to Congress all powers of all branches of government. The framers' carefully worked out scheme of separation of powers, of checks and balances would be infringed and I think rendered meaningless. Accordingly, however broad the Congress' appropriations power may be, and it is among its broadest powers, the power may not be exercised in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of the other branches. And I mean here the exclusive constitutional prerogatives.

There are two other provisions of S. 1721 which I think raise similar kinds of concerns. They are not new to the bill; they are reconfigured somewhat and probably in the right direction. I beg your pardon. With respect to covert operations, I think the provision dealing with covert operations does not permit a claim that sources and methods information should not be disclosed. So on balance, I think it might well go the wrong direction, but our position with respect to the 48 hour notice requirement, relying as it does essentially on the constitutional authority of the President to maintain the secrecy and confidentiality of certain information, extends as well to this provision. This also could implicate deliberative pre-decisional kinds of information, which is another prong of the executive privilege, truly according to the Supreme Court a less muscular prong, but nonetheless another area where the President is constitutionally privileged to maintain confidence.

I think that these points are the salient points, Mr. Chairman. I will omit the remainder of my prepared testimony. I do hope, however, that I will be permitted to address a point that was raised by Senator Specter concerning the Intelligence Authorization Act. I am sorely eager to speak to a situation that we have with respect to that act and in particular to make known to Senator Cohen some things and I would look forward to that opportunity if I may have it.

Chairman BOREN. You may proceed ahead if you wish.

Mr. COOPER. Wonderful.

That statute, as you know, was signed by the President. However, he indicated that he did not think that a particular provision of it was constitutional, and he instructed the attorney general not to abide by it. It was a provision that requires——

Senator COHEN. Excuse me. Was that the sequence in which it occurred, that he did not think it was constitutional and instructed the Attorney General, or did it come the reverse way? Did the Attorney General think it was not constitutional and asked the President to include language in his signing statement to—words of that effect?

Mr. COOPER. Certainly the Justice Department advised the President in this regard, yes sir.

Chairman BOREN. I might say, the President, then after issuing that public statement, sent a letter to Senator Cohen and myself and may have sent a letter to others clarifying the meaning of that public statement. I would like to enter into the record at this point the letter from the President to us in which he clarifies his earlier public statement.

Mr. COOPER. I have a copy of the letter here, and if it would be convenient, I will supply it for inclusion into the record.

[A copy of the letter from the President follows:]

THE WHITE HOUSE
WASHINGTON

Dear Mr. Vice Chairman:

In view of the final paragraph of the signing statement dated December 2, 1987, with respect to Section 501 of the Intelligence Authorization Act, Fiscal Year 1988, and in order to avoid any misunderstanding or misapprehension, that paragraph does not instruct, and was never intended to instruct, the Attorney General to disregard valid Federal law, but to emphasize my constitutional concerns with respect to Section 501. I have instructed my staff to examine this issue further to determine if these constitutional concerns can be eliminated and to work with the Senate Intelligence Committee in that regard.

Sincerely,

Ronald Reagan

The Honorable William S. Cohen
Vice Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Mr. Cooper. In any event, the point I want to speak to is not so much the substantive constitutional question, although I am happy of course to deal with that, but it is the process objection that was made. And I am not here to make a defense to the process objection, I am here to make an apology for it.

Senator Cohen. In your statement of a few days ago, of which I was not aware until yesterday evening, or certainly I wasn't aware of the process objection that it reflects until yesterday evening, you objected to the fact that the bill, the Intelligence Authorization Act, had purportedly received Justice Department review on a couple of occasions, and yet no constitutional objection was disclosed to this committee. And therefore Senator Cohen quite properly, I think, criticized the Administration and particularly the Department of Justice for the position he found himself in, which I fully understand does look like a sandbag.

It, however, was a grievous error. I have not yet found out where the failure was. If it was in the Office of Legal Counsel, the Office extends its apologies to this committee and to you Senator Cohen. If it is elsewhere, the Department extends its apologies for that failure.

But I want to also make a personal note because my own embarrassment, which is high, is intensified because the consequences of our failure were visited on you so directly, Senator Cohen. I do believe, through my observation, that you are among the members of Congress who take very seriously constitutional concerns and very carefully consider them from whatever quarter before you undertake to make a decision as a member of this body. And so I fully believe your statements in the record to the effect that if this had been known we might have averted this problem. It may well be true; an opportunity we missed for cooperation and the fault lies with us and we apologize for it.

Senator Cohen. I thank you for your comments. The wound was doubly grievous in this case because Senator Boren, myself and other members of the committee were trying to structure the legislation to take into account the administration's position on how to resolve this issue, and in fact had tailored the legislation specifically to accommodate an administration proposal recommended to us. So, on the one hand we were acceding to the Administration's recommendations as to how best to deal with a notification requirement, and then having legislation circulated through the administration, having it pass both houses, go to the President's desk, and then learn for the first time that the Department of Justice felt it was unconstitutional. We acceded to what we believed was the administration position and then the administration said that it was now unconstitutional.

Mr. Cooper. You can only imagine, I guess, my mortification when I read your statement last night. I think my staff would testify that we resolved to find out what happened and to the extent we discover procedural deficiencies in our operations they will be remedied. But we apologize——

Senator Cohen. You may want to address the second aspect of that, for Senator Specter, Rudman, and myself, in terms of whether or not if the President sees something or believes something is unconstitutional, a portion thereof, whether he can in fact sign a bill and then in good conscience say that he is faithfully executing the laws by exempting certain provisions and directing his Attorney General to disregard them. I think that is a separate issue which you may want to address.

Mr. **Cooper**. It is. I would be happy to do that at your pleasure, Mr. Chairman.

Chairman **Boren**. I think that is an important matter. Let me say that on the process question I, too, was additionally alarmed by the fact that apparently this matter was presented to the President and a Presidential statement was issued without the notice to or consideration by the National Security Council as well, of the position the President was being asked to take by the department. I think that is particularly alarming since it was concerns from the President's own Administration, particularly the national security of the President's own Administration that played a part in prompting some of the provisions of this legislation. The idea that there would be a backdoor process utilized where one member of the cabinet might slip in and get the President to issue a public statement without review by the National Security Council evokes alarming memories of one or two or three people using side door access to the President without the appropriate review of members of the cabinet and others on a broad range on a policy question of this magnitude. So let me underline the concern that Senator Cohen has raised. Not only do I think it was a very unfair matter as far as this committee was concerned, but I think it was a breakdown of administrative procedures and due consideration by the whole national apparatus where we must appear to view a maverick operation by the Justice Department, some sort of end run around the regular national security apparatus. I felt very strongly that one of the problems of the Iran-Contra matter was that the President was deprived of the advice of his most knowledgeable advisors, people like the Secretary of State, the Secretary of Defense, and indeed on that occasion the Attorney General as to legal aspects of actions that were being undertaken in his name. I think that was an alarming breakdown. One I think that is all the more shocking in terms of the fact of the experience that we have been through, that the Justice Department or the Attorney General would evade the regular national security procedures of having others in the administration and national security area have a thorough discussion of the matter before it was rendered. I simply want to emphasize a point that has been made by Senator Cohen because that is depriving the President of the best advice. I can only say I can imagine the President of the United States himself is exceedingly embarrassed by this matter and I think a close reading of his letter to myself and the Vice Chairman indicates by reading between the lines that there was a good deal of Presidential embarrassment on this matter.

As a former governor, I have to say I am in full agreement with the point raised by Senator Rudman earlier, during questioning by Senator Cohen and Senator Specter, from his experience as a former State Attorney General. The idea that you sign a law as an executive and then say I don't intend to abide by it because I don't think part of it is constitutional I think erodes the whole concept of the rule of law. Under our system if the executive doesn't believe that a legislation enactment is constitutional, he should veto that law and have a test of that question. But just to sign something into law and then to say I am going to disobey it again takes us down the slippery slope of leaving uncertain exactly what the law of the country is and what the duty or responsibility of the President is to faithfully execute it.

I must say I think, again in light of the experience we have been through and the sort of idea that we can pick and choose, Senator Rudman's analogy of I'll take the main course but leave off the dessert, picking and choosing between the statutes as to what is the law and what the President has the obligation to faithfully execute, is a very serious matter. I have to say that I am incredulous not only at the process that was followed or not followed in the deriving of a public statement by the President of the United States on a matter of this importance, but I am also incredulous in light again of the experience that we have just gone through, that the President would be advised by his legal advisors to take a step which again puts us in the position of leaving what the law is in doubt, and of not clearly affirming the obligation of the President to carry out a law unless he wants to exercise his constitutional right of veto. I think it is quite possible that if he had vetoed this legislation, perhaps we would have simply gone back to the drawing boards to see if we couldn't find a compromise. But I think it is a very serious matter and I have to say it is one of the most serious mistakes that I have seen made since we have gone through this whole process.

Mr. COOPER. Well, before I get to substance, one final point on process. I am unaware of any irregularities in the processes for review and discussion of enrolled bills. I am aware of no irregularities as you were suggesting.

Chairman BOREN. Well, let me say, it was not discussed with the members of the National Security Council.

Mr. COOPER. Well, from my observation point, which obviously is in the lower reaches, I saw no irregularities in the enrolled bill review, and the matter was discussed with the people in that process. However, I am acquainted with the procedural failure that we've already discussed and that is a failure that we are responsible for and would hate to see you visit that blame for upon the President.

We let the President down every bit as much as we did the Congress in terms of not being alert to advise of the constitutional problem that we ultimately did find with the bill.

On the substance, I think one has to look at this in two steps. The first one is whether or not a President must veto a bill he believes to be unconstitutional, must veto it. There are arguments and people who make arguments on both sides of that question. However, Presidents throughout our history have rejected that proposition. That would place them in an impossible position simply because, particularly in the modern era, bills that are needful—in fact essential to the welfare of the American people—may be presented to the President which have some kind of constitutional deficiency of a minor nature when viewed in the context of a large omnibus bill. Presidents have believed themselves simply unable to veto the large dog because of some unconstitutional tail, if I may put it that way.

The Supreme Court has recognized that that in no way prejudices the President's ability to maintain his view that the law is unconstitutional and indeed to refuse to defend it. I think the Chada case expressly dealt with arguments to the effect that the President, because he had signed one House veto legislation scores of times, was somehow not in a position to maintain that they are not constitutional. Of course these were signings that had taken place despite repeated statements by Presidents to the effect that the legislation contained an unconstitutional feature.

I think that it was precisely the same situation in Gramm-Rudman, wherein everybody involved in that process, I know, kind of felt, well, this is a tough constitutional question. The President signed it, it was litigated, and his views were upheld. It could well have happened that Congress' views were upheld in that situation, but the point is the question can't be as simple as this provision is unconstitutional, or at least the President thinks so, and therefore he has no choice but to refuse to sign the bill.

It's a different and tougher question, Senator Cohen, whether or not he will then not abide by it. That question is different and much more difficult. It involves what I believe to be a variety of considerations. For example, how clearly unconstitutional in the mind of the President is it? Is there reasonable disagreement here? If there is, and owing to the respect that any President should have for Congress' views on the Constitution, a President may well decide that he is going to abide by the statute, although he believes it to be unconstitutional. So that's one consideration.

Another one is to what extent is it possible for the unconstitutional feature to be reviewed by the courts. In Gramm-Rudman, we knew we were going to be in the courts rapidly and that any constitutional offense that might result from Presidential execution of the unconstitutional feature would be limited and might never even come to pass. That's what we had there.

Here, as to those considerations, and there are probably others, we believe the provision is clearly unconstitutional, although we certainly understand there are arguments to the contrary. And second, we don't believe there is any way this provision could be litigated. Yet the President felt it very needful to sign the Intelligence Authorization Bill by virtue of its essential nature to the welfare of the country.

Senator COHEN. I think in that case he should have vetoed the measure, sent it back to us, and we might have taken that provision out. I think we would have accommodated him. I think that's the way it ought to be done. But he should not give a statement saying I'm directing my Attorney General to disregard that particular provision of the law that I am now signing into full force in effect. I think that is a bad policy if not an unconstitutional one.

Chairman BOREN. I would agree with Senator Cohen. I think you make a point in terms of the constitutional necessity of always vetoing legislation. It may not be always constitutionally necessitated that the veto be utilized. I think I would agree with you as to the matter of the bottom line under the law of the Constitution. I think it is a very unwise policy. Other alternatives should be found than simply signing legislation and then stating constitutional objections and that you wouldn't be bound by it. It would be far better to prevent those objections from actually getting into the law. It would be far better to avoid the ambiguity of having something written as a statute that the President doesn't feel that he can faithfully execute.

We're going to have to have a short recess. I apologize. We'll come right back. We have a vote in progress.

Chairman Stokes and Congressman McHugh have arrived. Mr. Cooper, is your schedule such that you would allow us, to proceed with their testimony? We anticipate that their testimony would be relatively brief. They have very tight schedules. There are other questions obviously. And I know you look forward to engaging in this kind of consultation with the committee on these important matters.

Mr. COOPER. I will, of course, accommodate my schedule to that request. Certainly.

Chairman BOREN. I appreciate your consideration. I apologize for the situation we are in. We'll take a short recess while we conduct this vote and then we'll presume.

[A recess was taken from 11:46 o'clock a.m., to 12:05 o'clock p.m.]

Chairman BOREN. We'll resume. The other members of the committee are on their way back and again let me apologize to our witnesses today for the difficulties we are having in scheduling. There was a meeting of the leadership at the White House this morning that went longer than scheduled. And now we have had several votes on the floor which have disrupted our discussion. Let me express my appreciation again to Mr. Cooper for taking a break at this point in his testimony, to Chairman Stokes and our colleague, Congressman McHugh for the delay in getting started with your portion of this testimony.

Let me say, as we hear from the distinguished Chairman of the House Intelligence Committee, Chairman Stokes, and from Congressman McHugh, the Chairman of the Subcommittee on Legislation of the House Intelligence Committee, how much the members of this committee value the relationship with our counterpart committee on the House side. I don't think that there has ever been a closer relationship between the two committees than there is now. We value very much your thoughts and your advice on any matters before us, Mr. Chairman and the members of your committee. I want to express my personal appreciation to you, your Vice Chairman and all of the members of your committee who have shown such a wonderful spirit of cooperation as we work together in this area. We are all really trying to form a partnership, a relationship of trust and teamwork within the Congress itself and between the Congress and the Executive branch in this very important national security area. I think we've made significant progress on all fronts. Let me say to you, Mr. Chairman, I think its been due in no small part to your outstanding leadership in this field. We are very happy to have you with us this morning and we'll hear from you, Chairman Stokes and then from Congressman McHugh at this time.

STATEMENT OF HON. LOUIS STOKES, CHAIRMAN, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

Representative STOKES. Thank you very much, Mr. Chairman. And may I at the outset say to you that I've missed the daily association that you and Senator Cohen and I had when we were serving on the Iran-Contra Committee. During the long period of public hearings we spent long hours together. And I'm very pleased because it gave me the opportunity to get to know you and to have a close association with you and the opportunity for us on almost a daily basis to be able to discuss some of the problems related to intelligence that we were both encountering. And out of that association grew a great respect and very high regard for you and the great work that you are involved in here in the Congress and the leadership that you are giving the Intelligence Committee of the Senate and it is indeed an honor to appear here today and have the opportunity to testify before you.

Chairman BOREN. Thank you.

Representative Stokes. Mr. Chairman, may I begin by commending the committee and particularly you and Senator Cohen for your cosponsorship of Senate bill 1721. This bill is an excellent approach towards improving the Intelligence Oversight Act of 1980 and in the spirit of the recommendations of the joint Iran-Contra Committee.

As you know, our staffs have worked together discussing additional changes to the Oversight Act based on the comments and the helpful criticism of many outside experts. I believe there are several important adjustments that can be made to this bill. But I commend again the comprehensive, measured, and careful approach of Senate Bill S. 1721.

Mr. Chairman, although S. 1721 would revise the structure of the Intelligence Oversight Act, its substantive changes in law are few. Indeed, they are more in the nature of refinements of a statute now seven years old than they are structural changes in congressional oversight. They are, nonetheless, essential revisions.

Let me briefly explain why I feel that Congress must now address such changes. As we all know, much of the impetus for S. 1721 comes from the Iran-Contra affair. During the joint committees investigations, a number of disturbing events were exposed which must give us pause in assessing the adequacy of congressional oversight of intelligence activities.

The most egregious event involved the 10-month delay in notifying Congress of the January 17, 1986 Finding on Iran. Indeed, it is not clear exactly how long the President would have delayed notifying the Intelligence Committees of this Finding, since we learned of it through a leak in a foreign publication, not from the President himself. What the President did in this case was interpret the timely notification language of section 501(b) of the National Security Act to mean that he could delay indefinitely any notice to the Congress of a significant intelligence activity. Subsequent statements by the Department of Justice make clear that, in the view of the President's lawyers, the President was wholly within his rights under the Constitution as well as under the oversight statute to act as he did.

Another disturbing revelation in the Iran-Contra affair was the stand-alone, off-the-shelf, independently-financed covert action capability that Colonel North and Director Casey sought to create. I am uncertain that provisions of Title V of the National Security Act—as now written—would have required notice of this entity to the Intelligence Committees under all circumstances. Sections 501, 502, and 503 certainly were intended to do so but we now must ask ourselves whether the provisions of this title need to be amended.

Another aspect of this independent covert action capability was the fact that administration officials believed that they were able to do indirectly what they were clearly prohibited from doing directly. I believe that it should also be clear to us that the provisions of Section 503 of the National Security Act which require notice to the Intelligence Committees of covert arms transfers were inadequate to cover the sale of missiles to Iran. It also should be revised.

Mr. Chairman, beyond the disturbing fact that a significant covert action came to be conducted without any notice to Congress, I believe that we should be concerned that this administration, as is fully documented by Mr. Cooper's memos of December 17, 1986, was willing to interpret the President's authorities under the oversight statute so broadly as to undermine the assumptions that Congress made when first drafting it. Those assumptions were:

That the President would not take advantage of his position as controller of information to unilaterally withhold from Congress information required by Congress for unreasonable periods of time.

That he would not use sources and methods as a shield to protect his policies from criticism by the Intelligence Committees.

And that he would carry out his responsibilities to inform the Congress of covert action operations under the statute in a spirit of comity, cooperation and mutual respect.

Finally, Mr. Chairman, if we needed no other reason to revisit the statute, the assertions by the Department of Justice in Mr. Cooper's memoranda of December 17, 1986, put on the record a straightforward, unequivocal and extremely broad assertion of statutory and constitutional interpretation which will stand uncontradicted absent some congressional action. We can, and no doubt will, disagree on exactly what the exact terms and conditions of delayed notice to Congress of covert actions should involve, but I think we can all agree that the assertions in Mr. Cooper's memorandum go well beyond anything that Congress can accept because they are not limited to covert action and they admit essentially no limits on the President in his discretionary withholding of information. This is clearly, in my view, inconsistent with the Congress' right to have enough information to make laws or to ensure their proper execution.

My reading of the legislative history of the 1980 Act indicates that when Congress wrote its timely notice provision in section 501(b), it was thinking of situations where time would be of the essence and the press of events would not permit the President to notify the Intelligence Committees of a covert action which he felt it imperative to launch immediately. The Department of Justice, on the other hand, has read that legislative history to mean that the President may withhold notice of covert actions or other intelligence activities in his discretion for as long as he feels appropriate.

I believe the Iran-Contra committees rightly judged that these assertions would play havoc with congressional oversight.

Mr. Chairman, as I read S. 1721 and compare it to my own bill, H.R. 1013—which has been the subject of a number of hearings before Mr. McHugh's subcommittee—I believe that the key issues are covered. I think this bill properly reasserts, as many public commentators seem to forget, that the statutory rule for nearly every covert action is prior notification. The bill also addresses the central controversial issue of what appropriate timely notice should be. It sets an outright limit of 48 hours, one which I feel to be appropriate. I must say that I also feel that, both to justify this time limit and to explain its rationale, it is necessary to make clear that, as in 1980, the only appropriate reason for such a delay—if any—is the press of events

For instance, Senator Inouye, the first chairman of this committee, said during the 1980 Senate debate, and I want to quote him:

> I am of the firm belief that the only time the President would not consult with the Intelligence Committees in advance would be in matters of extreme exigency. In my experience as chairman of the Intelligence Committee and as a continuing member of that committee, I can conceive of almost no circumstance which would warrant withholding of prior notice, except in those very rare situations where the President does not have sufficient time to consult with Congress.

Senator Huddleston, the Senate floor manager, stated, and I quote him:

> I myself believe that the only constitutional basis for the President to withhold prior notice . . . would be exigent circumstances when time does not permit prior notice.

The Statement of Managers language accompanying the conference report on the oversight act suggested the very highest standard by stating, and I quote again:

> For example the statute would not preclude an Executive branch assertion of constitutional authority to take actions to defend the nation . . .

When time is of the essence and the President must act, he should act, but 48 hours is certainly a reasonable time within which to subsequently notify Congress in the rare cases where prior action, rather than prior notice, is necessary. This approach, in my view, pays all due deference to the President's constitutional prerogatives by recognizing his duty to respond swiftly in times of crisis. That is why the 48 hour rule was proposed.

Mr. Chairman, I will defer to my colleague, Mr. McHugh, the chairman of the House Intelligence Committee's Subcommittee on Legislation, for further comments on S. 1721 but I want to close with a word on the constitutional issue raised by the Department of Justice. Among constitutional scholars, the subcommittee found no quarrel with the constitutionality of H.R. 1013, which would permit delayed notice of covert actions only in cases where time is of the essence. They thought, in other words, that Congress could, under the Constitution, insist on a requirement of prior notice of covert action with very limited exceptions. I will not presume to claim constitutional expert's credentials, but I can speak favorably for the concept of intelligence oversight that S. 1721 and H.R. 1013 would reinforce. Congress established its Intelligence Committees to act as surrogates for the House and the Senate in reviewing covert actions. Since those operations, in effect, are secret foreign policy initiatives, prior notice—prior consultation—take the place that extensive debate plays with respect to other foreign policy decisions. Congress plays an important constitutional role in U.S. foreign policy debate. It cannot perform that role at all with respect to covert action if it is denied—through its surrogate committees—the most basic knowledge of such covert actions.

I thank you very much for this privilege of appearing here and at this time I would like to defer to the chairman of the Legislation Subcommittee on our Intelligence Committee of the House.

Chairman **Boren**. Thank you very much, Chairman Stokes, for a very thoughtful statement. Mr. McHugh, we would value your comments as the chairman of the Subcommittee on Legislation at this time.

STATEMENT OF HON. MATTHEW McHUGH, CHAIRMAN, SUBCOMMITTEE ON LEGISLATION, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE

Representative **McHugh**. Thank you very much, Mr. Chairman and Members of the Committee. I appreciate not only the opportunity to be here to testify on S. 1721, but also as a citizen as well as a Member of Congress to express my personal appreciation for the leadership which you and the other members of this committee have demonstrated in the intelligence field. I've been an admirer as well as a colleague of yours.

I join, first of all, of course, in the comments of Chairman Stokes and I'd like to comment briefly if I may on other features of S. 1721.

I believe that the bill does take a major step forward in setting forth the circumstances under which oral Findings are appropriate, specifically, when time is of the essence. I believe it was important to state, although I would have thought it clear from the present law, that retroactive Findings are inappropriate and should be banned. I agree that there should be more information in Presidential Findings, that the agencies to be involved should be designated, and I agree that in the context of a statutory revision of title V of the National Security Act, a new definition of covert action is appropriate.

If I may, Mr. Chairman, I hear my beeper advising us of a vote.

Chairman **Boren**. There are many activities. At least observers will be reassured by the fact that there is work going on in both the House and Senate today; even in addition to the work going on in this hearing.

Representative **McHugh**. I hope so, Mr. Chairman.

Thank you.

I would also like to add that I believe the Hughes-Ryan definition should be retained for CIA activities and that a definition similar to that provided in the Executive Order for Special Activities apply to all other government agencies.

Let me expand, if I may now, briefly on the key differences between Senate bill 1721 and H.R. 1013, which, as you know, is the

Stokes/Boland bill that was the subject of hearings before our Subcommittee on Legislation. H.R. 1013 makes clear, and I hope subsequent amendments in committee will make even clearer, that in almost all cases the President is required to notify the Intelligence Committees of a special activity prior to its initiation. However, in extremely rare cases, and specifically where time is of the essence, the President may initiate a special activity without first notifying the committees. In these limited cases, the President must notify the committees as soon as possible but no more than 48 hours after his approval of the special activity.

I want to emphasize here, Mr. Chairman, that notification should be as soon as possible after the President's approval. Not necessarily on the 47th hour, and that 48 hours is not an automatic range of flexibility, but the maximum outer limit of permissible delay.

We believe that these concepts are important ones if there is to be meaningful consultation and oversight. I believe they will be the most discussed and debated provisions in our bill and in yours, but on them hinge the future of what consultation does occur between the President and Congress on very sensitive covert actions which affect the vital interests of this country.

There is no question but that covert action can be a useful tool. I don't think there is any member of our committee, and I suspect yours, that would argue with the utility of covert actions. But these actions can also turn into disaster for any President by badly skewing the direction of U.S. foreign policy. For this reason, I would urge upon the committee a revision of the language of section 503(c) of Senate Bill 1721 to stipulate that the press of events alone should be the justification for dispensing with prior congressional notification of a special activity. I firmly believe that the limited "Gang of Eight" notice is the appropriate alternative to the President when he wants to protect especially sensitive covert actions.

As I indicated earlier, Mr. Chairman, I also believe that the definition of special activities provided in the Executive Order is appropriate for all agencies other than the CIA. I do not agree with S. 1721's approach of excluding certain law enforcement or military activities which otherwise meet that definition. I believe that the Executive Order definition generally has stood the test of time.

Finally, Mr. Chairman, I must express some concern about the second proviso contained in section 501(a) of the bill. I understand that it is intended as a disclaimer of any intent to inhibit the President from initiating covert actions when he is not otherwise restricted from doing so by law. However, I believe that in light of what we have seen from the Department of Justice, and specifically it's interpretation of section 501(b) of the National Security Act, we could expect either this administration or possibly a future administration to read such a proviso as a congressional disclaimer of the binding effect of prohibitory statutes affecting particular covert actions. I know that is not the intent of the proviso in the bill. However, my own view would be that if it is felt that a constitutional disclaimer is necessary, it be written in the nature of a freestanding disclaimer, such as, and I quote for example, "Nothing in this section or title is intended to modify the Constitution." I find that personally much less troublesome than the proviso in the new section 501(a)(1).

Mr. Chairman, because I'm following Mr. Cooper, who, in representing the Department of Justice has a clearer claim to constitutional expertise than I, and because Mr. Cooper has, as I understand it, told you that the 48 hour timely notice provision is unconstitutional, let me tell you what the House Intelligence Committee on Legislation has heard from a range of constitutional experts. None of them, save Mr. Bolton, the Assistant Attorney General for Congressional Affairs, believed there were any constitutional impediments to a stricter 48-hour provision than is contained in S. 1721, that is to say, the same provisions essentially as H.R. 1013. These experts specifically addressed the issue of 48 hour notice and could find no constitutional objection to it. The subcommittee heard from Lawrence Tribe of Harvard Law School, William Van Alstyne of Duke Law School, and Louis Henken of the Columbia Law School.

[Letters from Mr. Tribe, Mr. Van Alstyne, and Mr. Henken follow:]

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February 24, 1987

Bernard Raimo, Jr., Esq.
Counsel
Subcommittee on Legislation
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515-6415

Dear Mr. Raimo:

I have received your letter of February 18 and the attached copy of H.R. 1013, the proposed legislation to strengthen the system of congressional oversight of the intelligence activities of the United States. I share the view of the co-sponsors of this bill that the bargain struck in 1980 between Congress and the executive branch has been abused by the Reagan administration in ways violating the intentions underlying that bargain and that the proposed restatement of the Act, with the greater precision contained in H.R. 1013, would reduce the risk of further abuse without infringing in any way upon the constitutional responsibilities of the President and of the Executive Branch.

Although my schedule would make it impossible for me to testify in late March, I would be happy to have this brief letter read into the record of any hearings that might be scheduled.

Sincerely,

Laurence Tribe

Laurence H. Tribe

LHT:lks

Columbia University in the City of New York | New York, N.Y. 10027
SCHOOL OF LAW 435 West 116th Street

31 March 1987

Dear Mr. Stokes,

Your Committee has invited my views on the constitutionality of "the prior notice provision" in H.R. 1013, "insofar as it may impinge on Presidential powers to conduct the foreign relations of the United States."

The Constitution does not expressly confer authority in respect of intelligence activities upon either Congress or the President. Any authority they may have to carry out or regulate such activities is an aspect of their general foreign affairs powers.

The Constitutional blueprint for the distribution of power in regard to foreign affairs is reasonably clear insofar as it is explicit, but it leaves much unsaid. Some general principles and guidelines for supplying "missing powers" have become established. The authority which the Constitution expressly confers on the President to appoint and receive ambassadors has been construed to imply a larger responsibility. In 1936, the Supreme Court referred to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 320

(1936).

As "sole organ," the President has authority to conduct foreign relations, and is "the eyes and ears" as well as "the voice" of the United States. Presidents have also claimed authority to determine the foreign policy of the United States and to engage in "foreign affairs activities." But the President has generally asserted power to engage in such activities on his own authority when Congress was silent. He has not often denied the power of Congress to regulate them. He has rarely insisted on the power to act when Congress has directed him not to, or to disregard conditions imposed by Congress on his action.

In principle, the President's power to act inconsistently with Congressional directive is limited to small areas where the President's Constitutional authority is exclusive. For the rest, there is a strong case that even if the President may act when Congress is silent, he is subject to Congressional direction. In his famous exposition of the principles of separation of powers, Justice Jackson said:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952).

Where the President has independent constitutional authority to act, Congress is constitutionally bound to implement his actions, notably by appropriating the necessary funds. Where the President's authority to act is not exclusive but is subject to regulation by

Congress, Congress may prohibit or limit the President's activity directly by legislation, or indirectly by denying him funds or by imposing conditions on the use of funds appropriated.

Applying these general principles and guidelines to "intelligence activities," I distinguish between gathering information and other covert actions commonly included in that rubric. The gathering of information is a principal purpose of sending ambassadors and maintaining diplomatic relations, an exclusive Presidential power. It is only a small extension to conclude that gathering information by any means is part of the President's "eyes and ears" function. There is, therefore, a strong case for Presidential authority to obtain intelligence not only through our embassies but also through other agents representing the Executive, or through military agencies under the President's command. Congress should not interfere with that function.

On the other hand, there is little to support the view that other kinds of activities now lumped under the heading of "intelligence activities," which are not designed for gathering information and are not otherwise intimately related to the diplomatic or military command function, are an exclusive Presidential function. Assuming that the President has the power to carry out such activities without Congressional authorization, Congress has the power to regulate such activities, and the President is bound by Congressional directives. Since Congress can regulate such activities, it may properly refuse to appropriate funds to support them and may impose conditions on the use of any funds appropriated for such purposes. The President is constitutionally bound to see that such Congressional mandate is respected and faithfully executed.

Addressing H.R. 1013, I am of the opinion that Congress can properly require prior notice (or notice within 48 hours) of "covert activities" other than those limited to intelligence gathering.

Intelligence-gathering activities, however, may not be subject to regulation by Congress. Congress is probably entitled to ask to be informed of such activities as necessary and proper to the exercise of its various powers and those of other branches of the government of the United States. (U.S. Constitution, Art. I, sec. 8, cl. 18.) The right of Congress to be informed, however, ought not to be exercised in ways that would interfere with the activity. In particular, it is difficult to make a case for the right of Congress to know of every particular intelligence-gathering activity in advance, or within 48 hours.

The distinction between gathering information and other intelligence activities was recognized in the Hughes-Ryan Amendment to the Foreign Assistance Act, 22 U.S.C. §2422, which H.R. 1013 proposes to amend. The distinction is not found in the general provisions for keeping the Congress "fully and currently informed" embodied in the Intelligence Oversight Act of 1980, 50 U.S.C. 413(a), but it is found in §413(b) requiring "timely" notice when prior notice is not given under subsection (a). Since H.R. 1013 proposes to eliminate the reference to executive authority under the Constitution as well as existing subsection (b), you may wish to consider either excluding intelligence-gathering from "intelligence activities" under §413, or writing an additional reporting requirement in different terms, tailored to intelligence-gathering activities.

Sincerely yours,

Louis Henkin

Louis Henkin

The Honorable Louis Stokes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515-6415

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March 2, 1987

Mr. Bernard Raimo, Jr., Counsel
U.S. House of Representatives
Permanent Select Committee on Intgelligence
Washington, D.C. 20515-6415

Dear Mr. Raimo:

I am writing in brief reply to your letter and enclosures of February 17th, re proposed amendments to 50 U.S.C. §413, and to 22 U.S.C. §2422. On the face of the proposed changes, I do not see any basis for serious constitutional concern, but I regret that my impression is necessarily highly tentative for lack of sufficient background: (a) in respect to how these particular statutes operate with other statutes; and (b) what objections, if any, the executive department may see reason to present.

To the extent that this brief letter will be unhelpful in failing to have identified the "right" problems, I would be pleased to kept current with the scheduled Committee hearings to see whether, at that later time, a more concrete and more useful review can be provided. Generally, however, the matters broached by this bill seem to me to encompassed by the following constitutional propositions.

The President and the Congress have a large degree of overlapping (concurrent) constitutional authority in respect to foreign affairs in the first instance. In the absence of congressional legislation, moreover, the tendency of our judiciary is to sustain executive action by deferring to the presumed good faith, superior competence, and wide range of implied executive power over foreign relations. Alternatively, executive action uncircumscribed by Congress is treated as essentially "nonjusticiable" in our courts.

Even in respect to foreign affairs, however, the plan of the Constitution establishes Congress as *primus inter pares*, *i.e.*, as first among equals, most especially in framing basic standards to guide the executive obligation--to take care that the laws shall be faithfully executed. The general standard is best enunciated in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube v. Sawyer*. It remains the single most reliable utterance in this field. Accordingly, to the extent Congress desires clarity, certainty, and reliability in highly problematic areas of executive direction of foreign intelligence activity, it is both appropriate and essential that Congress should say so, by law, as concretely as it can agree to do. The current proposals appear to recognize such a need. As concrete and *affirmative* statutory provisions, they are important.

The explicit tightening of the executive notification requirements in the manner reflected in the proposed legislation seems to me to be well within congressional prerogative, moreover, especially as it is limited to "Central Intelligence Agency . . . operations in foreign countries, *other than* activities intended *solely* for obtaining necessary intelligence." (Emphasis added.) To the extent that Congress might not wish the C.I.A. to be used other than for strictly information-gathering purposes at all, I have no doubt Congress could, constitutionally, so provide. To the extent that certain covert action may instead be authorized under executive discretion, that it not be done through the C.I.A. unless strict reporting standards are satisfied, seems to me to stand on the same footing. It is up to *Congress* to determine whether the creation, funding, and organization of a given agency is, in its own sole view, "necessary and proper" to carry into execution either its own obligations or those of the executive department. Correspondingly, to the extent the Congress does not wish the C.I.A. utilized in certain ways without strict executive observance of prescribed notification requirements, involving pertinently identified special committees of the Congress, it may assuredly, and constitutionally, so provide. (Insofar as the executive department may have practical misgivings about the proposed restrictions, it is of course appropriate for the department so to speak its mind--but that is the extent of its prerogative, nothing more.)

On the other hand, it may be arguable that the President, as Chief Executive, cannot be made to provide identical notice to subordinates within the Executive Department itself (including members of his own Cabinet) if the President deems this undesirable, as a matter of exclusive executive discretion. I have not specifically tried to research the point, but it seems to me that it may stand on a different footing than the notice to Congress requirements, despite the preceding discussion which would otherwise seem controlling. Briefly, the argument would run something like this.

In respect to Congress, insofar as Congress need not authorize a C.I.A. at all, I believe the President's use of the C.I.A. (especially for covert action as distinct from strict information gathering) may be made subject to the congressional reporting conditions reflected in the bill. It may seem that the same observation would apply to any other condition, of a merely similar kind, such as that he must also provide identical notice to the Secretary of State, and the Secretary of Defense if Congress so requires by law. But the latter two offices are themselves executive offices and, within his own "house" (so to speak), the President is master; he is not merely a colleague or even a chief administrator with only limitable discretion over whom he may or *may not* wish to confide in, within the executive department itself.

If that is so, then an effort to restrict the President by "conditioning" use of the C.I.A. by requiring him to report in some way to the Secretary of Defense and Secretary of State is arguably an unconstitutional condition on his authority as chief executive; whereas the use of such a requirement in respect to permanent select committees in Congress is not.

I have not researched or thought about this problem very deeply, however, and I may well be incorrect, i.e., that in fact such "subordination" of the President (to require his own reporting to other Cabinet officers) may not violate the separation of powers, although it appears to me that it may. Rather, it is simply the particular feature of the bill that alone gives me some pause and on which further research and discussion would be warranted.

Finally, the omission proposed from §501 of Title 50 of the United States Code seems to me probably to be altogether for the good. The language proposed for omission is currently but a confusing phrase which, on its face, seems to give too much away, or at least to leave the balance appearing as more merely precatory than authoritative, and I see no good constitutional reason to object to the deletion the bill proposes.

Again, my apologies for writing rather hastily. But should there seem any purpose to be served as the hearings develop on this legislation, I would be pleased to hear from you once again.

Sincerely,

Wm. Van Alstyne

William Van Alstyne
Perkins Professor of Law

Representative McHUGH. Now, as you will know from your reading of Mr. Bolton's letter in the subcommittee's hearings, and from Mr. Cooper's testimony today, the Department of Justice clearly leans heavily, as did Colonel North in his testimony before the Iran-Contra Committee, on the *dicta* of the *Curtiss-Wright* decision. As Senator Mitchell pointed out in an exchange with Colonel North, such a reliance is clearly inconsistent with the Court's rulings in other decisions which we think are most clearly on point. I refer specifically to *Youngstown Sheet and Tube.* I am not a constitutional scholar, but I agree with the Iran-Contra report and with Senator Mitchell's interpretation that Justice Jackson's opinion in the *Youngstown* case better expresses the constitutional byplay in an area where the Constitution has not clearly reserved an exclusive role to either branch.

Let me also say, lest there be any misunderstanding, that I have no quarrel, nor does any member of our subcommittee to my knowledge have any quarrel, that it is the President who has the executive authority in this government and who must conduct foreign affairs. He has wide discretion in carrying out his responsibilities, but Congress also has important concurrent powers. It alone makes the laws. It alone appropriates money and it may require an accounting of the expenditure of those funds. Clearly inherent in the power to make laws is the need to obtain information necessary to ensure their proper execution. Congress has a very real need for information to conduct its oversight of government activities. In fact, the more so in an area where all government activity is secret and where Congress has legislated restrictions on such activity and required reporting expressly. There the Congress stands on very firm ground in its legislative expression, as it did in 1980, and as I trust it will do again in 1987 and 1988.

Thank you, Mr. Chairman, once again, and members of the committee for the opportunity to be with you this morning.

Chairman BOREN. Thank you very much. Again, I want to thank both of you. You've added to our understanding, and of course, as I indicated in my opening statement this morning, we have benefitted greatly from the extensive hearings and work that has been done by the House Committee. The members of this committee are going to carefully study that record as we deliberate on this legislation. I think you have highlighted the differences between the two bills very well and raised some very important considerations for us.

Let me ask just one or two very brief questions. I think we're all working very intently to make sure that every member of both committees exercises the responsibility to safeguard sensitive information. I have been asked a question and it is one that comes to mind myself. When we get into a situation where we have a highly sensitive, covert operation, probably hundreds of members of the Administration have to be informed. One who has dealt with many of those operations said to me in the last few days, not only do hundreds of members of the Executive Branch have to know about it but usually there are scores of other people in other places, many of whom are not viewed as one hundred percent reliable because of the kinds of persons that you sometimes have to deal with in these operations. It does strain the credibility somewhat that you are increasing the risks by notifying eight people in the Congress since hundreds of people, both inside and outside our own government, some of whom have questionable backgrounds, have been told or are participating in the operation.

Now let's suppose that we have a situation which we hope will never develop, in which, for one reason or another, one, two or three members of the Group of Eight had a reputation for not safeguarding information always, maybe it's unintentional. The President was very concerned that the information being conveyed if revealed could endanger lives, for example, or the success of a sensitive operation. Now have either one of you thought of any mechanism that we might provide for in the legislation that would take care of that situation? Ideally, the leadership should never place persons on the Intelligence Committee who don't have reputations for safeguarding information. Or should make changes if that should occur. But we know that hypothetically could occur. And it's always difficult to make changes. Do you have any thoughts about how we might provide for that in the legislation if the President thought that in the case of one, two or three people out of this group of eight, there was some question as to whether they could keep that information long enough for the operation to be carried out?

Representative STOKES. Mr. Chairman, you present a very difficult hypothetical question. It is certainly conceivable within the realm of reality that this hypothetical situation could occur. And we certainly would hope that in reality it would never occur.

But just to try to deal with your hypothetical itself, it's very difficult to say how you would really legislate against that situation. As you and I both know, both on the Senate side and the House side, these are areas in which we have been concerned as chairmen of these respective committees. One of the ways that we have dealt with this overall problem on the House side is that the Speaker of the House has made it very clear to the Members of the House Intelligence Committee that there are some very privileged individuals in the House. That they are put in a very responsible position. That they are privy to information not generally given to other Members of the House. Consequently, pursuant to that responsibility given them, that if anyone violates it, that at any time he will remove them from the Intelligence Committee. And that's one way we have tried to deal with the problem in the absence of a legislative approach.

Chairman BOREN. We've done exactly the same as you did.

Representative STOKES. And I know that you have. I know that the Majority Leader here has made very clear also and I know your position on it is a very strong one.

We have thought on times and perhaps if you limited notice to say four of the eight. That might conceivably reduce the number of persons on the House and Senate side of knowing instead of the Gang of Eight, perhaps the Gang of Four, so to speak.

Yet, it is conceivable under your hypothetical that that could occur with reference to one or two of the four individuals. And since I don't know really how you can deal with it. Also you have to think of the fact that where hundreds of people know about a particular action, just adding one more certainly does not create more of a problem. And I really cannot say to you I'm aware of any legislative approach to that hypothetical.

Representative McHugh. Mr. Chairman, I think there is no failsafe way of absolutely guaranteeing secrecy. I think what one has to do is accept the possibility that this could happen but weigh the probabilities of it happening against the disadvantages of further limiting disclosure to Members of Congress, who by definition, are people who have been elected to the leadership positions in the House and Senate and who presumably have been judged by their colleagues to be people of high judgment and integrity.

I think the bottom line for me is that the risk of these people divulging very sensitive information is very small relative to the disadvantages of further limiting disclosure to the top leaders of the Congress. Therefore, on balance, recognizing that there is always the possibility of a leak, but that the risk of that is so remote as compared to the disadvantages of further restricting consultation with these high leaders, I think it is a risk that needs to be taken.

Chairman Boren. I would agree with you that the risk is very small that any of those individuals would not intentionally safeguard the information. But I wonder if one possible way might be—just to throw this out to ask your comment on it—that perhaps the President could notify a majority of the members of the group of eight. If in his own discretion and judgment, he wanted to withhold notification from one person, maybe that person is known to have a very strong philosophical feeling about a certain policy and to notify that person would place that person under an impossible obligation. Maybe there had been some recent circumstance in the last few days or hours, there had been a problem that hadn't previously been brought to the attention of the leadership, I wonder if there is some way that you could notify the leadership and then say there are one or two people where we may have a problem.

Senator Cohen. How do you know it's not the leadership?

Chairman Boren. If you notify a majority of the group of eight, you would have bipartisanship obviously involved and could share the problem or at least consult with them as to how to deal with the problem at that time perhaps.

Representative Stokes. Basically Mr. Chairman, I guess I would have a problem with that approach, and the problem would emanate from the fact that you have to go back again to what Mr. McHugh has said, first, those eight individuals, and eight is not really a large number, are given a position in leadership in the House and Senate and ordinarily those persons are selected very carefully. In the House for instance the entire Intelligence Committee is selected by the Speaker of the House. That's a very prestigious position to hold in the House. There is a long number of individuals in the House who would love to be on that committee and it is a very sought after position. And once there, most persons I think realize and understand that they have a very special relationship both to the Speaker and to the House and I think that carries with it that personal responsibility.

When you open the doors and say well the President can pick one or two or three who he would not give notice to, it is sort of like saying well I'm going to have a meeting down at the White

House such as we attended this morning and although I should invite all the chairmen of the sensitive committees that have something to do with intelligence in the House, I am not going to invite the Democrats down, I just think that there is one or two Democrats that I don't want down here because there are strong feelings. I just think it lends itself towards a subjective discriminatory process that I do not think we ought to subject to the President.

Chairman BOREN. Thank you. I appreciate your comments.

Senator Cohen.

Senator COHEN. Thank you. Mr. McHugh, just a couple of quick points about your testimony. Number one, I want to say that for all of the points you have made in agreement with S. 1721, I want to claim authorship of those and those you disagree with I want to lay on the hands of others on the committee. [General laughter.]

Chairman BOREN. I notice he may have taken a glance in my direction.

Representative MCHUGH. If you should disagree with any of my points, I will say the staff has prepared them. [General laughter.]

Senator COHEN. Second, it would be helpful I think if we had the benefit of the scholars who testified relative to the constitutionality of the 48 hour notice so that we could include them as part of our record.

Chairman BOREN. If it would be agreeable, we would very much appreciate receiving their testimony and being able to make it a part of our record.

Representative MCHUGH. Yes, Mr. Chairman, my recollection is that all of them that I mentioned submitted written statements to the committees which I'd be delighted to share with your committee.

Chairman BOREN. We would appreciate that and value that.

Senator COHEN. Mr. Stokes, I want to commend you for the service you performed on the Iran-Contra Committee. I must say that of all the people who were on there, you distinguish yourself with the kind of intensity, laser-like intensity, of the questions that you asked. And I think you continue to demonstrate that intelligent approach to intelligence matters. Why I really was pleased to be on the committee and serve with you.

Representative STOKES. Thank you, Senator Cohen.

Senator COHEN. I want to stress just one point.

Representative STOKES. I might just say that prior to your coming in, I had expressed to the chairman how very much I had enjoyed serving with the two of you on that committee and getting to know the both of you and having an opportunity to work on some very important work with both of you and indeed a great honor for me.

Senator COHEN. I would like to address the one point that has been raised, and I think that Mr. Cooper is going to be testifying about this. It is the historical background behind the prior-timely notice debate, and I would like, Mr. Chairman, to offer in the record a document submitted, a memorandum for the Attorney General it is dated December 17, 1986. I believe Mr. Cooper that you prepared this document, did you not.

Chairman BOREN. Without objection, it will be entered into the record.

[The document referred to follows:]

U.S. Department of Justice

Office of Legal Counsel

December 17, 1986

87-0587

Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act

This memorandum responds to your request that this Office review the legality of the President's decision to postpone notifying Congress of a recent series of actions that he took with respect to Iran. As we understand the facts, the President has, for the past several months, been pursuing a multifaceted secret diplomatic effort aimed at bringing about better relations between the United States and Iran (partly because of the general strategic importance of that country and partly to help end the Iran-Iraq war on terms favorable to our interests in the region); at obtaining intelligence about political conditions within Iran; and at encouraging Iranian steps that might facilitate the release of American hostages being held in Lebanon. It is our understanding that the President, in an effort to achieve these goals, instructed his staff to make secret contacts with elements of the Iranian government who favored closer relations with the United States; that limited quantities of defensive arms were provided to Iran; that these arms shipments were intended to increase the political influence of the Iranian elements who shared our interest in closer relations between the two countries and to demonstrate our good faith; and that there was hope that the limited arms shipments would encourage the Iranians to provide our government with useful intelligence about Iran and to assist our efforts to free the Americans being held captive in Lebanon.

On these facts, we conclude that the President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.

As we indicated in our memorandum of November 14, 1986, section 501 of the National Security Act permits the President to

withhold prior notification of covert operations from Congress, subject to the requirements that he inform congressional committees of the operations "in a timely fashion," and that he give a statement of reasons for not having provided prior notice. We now conclude that the vague phrase "in a timely fashion" should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken. Thus, the statutory allowance for withholding prior notification supports an interpretation of the "timely fashion" language, consistent with the President's constitutional independence and authority in the field of foreign relations, to withhold information about a secret diplomatic undertaking until such a project has progressed to a point where its disclosure will not threaten its success.[1]

I. The President's Inherent Constitutional Powers Authorize a Wide Range of Unilateral Covert Actions in the Field of Foreign Affairs

A. The President Possesses Inherent and Plenary Constitutional Authority in the Field of International Relations

"The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, sec. 1. This is the principal textual source for the President's wide and inherent discretion to act for the nation in foreign affairs.[2] The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes, at a minimum, all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

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[1] The vagueness of the phrase "in a timely fashion," together with the relatively amorphous nature of the President's inherent authority in the field of foreign relations, necessarily leaves room for some dispute about the strength of the President's legal position in withholding information about the Iranian project from Congress over a period of several months. The remainder of this memorandum outlines the legal support for the President's position, and does not attempt to provide a comprehensive analysis of all the arguments and authorities on both sides of the question. This caveat, which does not alter the conclusion stated in the accompanying text, reflects the urgent time pressures under which this memorandum was prepared.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate."[3] This fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" explains why the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens.[4] As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of the "executive Power."[5]

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[2] The Constitution also makes the President Commander in Chief of the armed forces (Art. II, sec. 2); gives him power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate (Art. II, sec. 2), and to receive ambassadors and other public ministers (Art. II, sec. 3); the Constitution also requires that the President "take Care that the Laws be faithfully executed" (Art. II, sec. 3). These specific grants of authority supplement, and to some extent clarify, the discretion given to the President by the Executive Power Clause.

[3] The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). This number of the The Federalist was devoted primarily to explaining why the power of making treaties is partly legislative and partly executive in nature, so that it made sense to require the cooperation of the President and the Senate in that special case.

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[4] Congress's power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," art. I, sec. 8, cl. 11, like the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," art. I, sec. 8, cl 10, and the power "[t]o regulate Commerce with foreign Nations," art. I, sec. 8, cl. 3, reflects the fact that the United States is, because of its geographical position, necessarily a nation in which a significant number of citizens will engage in international commerce. A declaration of war immediately alters the legal climate for Americans engaged in foreign trade and is therefore properly treated as a legislative act necessarily binding on an important section of the private citizenry. Similarly, Congress's broad power over the establishment and maintenance of the armed forces, art. I, sec. 8, cls. 12-16, reflects their obviously important domestic effects. In accord with Hamilton's distinction, however, the actual command of the armed forces is given to the President in his role as Commander in Chief. Treaties (in whose making the Senate participates under art. II, sec. 2) have binding legal effect within our borders, and are most notable for the significantly small role that Congress plays.

The presumptively exclusive authority of the President in foreign affairs was asserted at the outset by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain impartial in the war between France and Great

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[5] As one would expect in a situation dealing with implied constitutional powers, argument and authority can be mustered for the proposition that Congress was intended to have a significant share of the foreign policy powers not specifically delegated by the Constitution. Perhaps the most oft-cited authority for this position is James Madison's "Helvidius Letters" (reprinted in part in E. Corwin, The President's Control of Foreign Relations 16-27 (1917)), where he cautioned against construing the President's executive power so broadly as to reduce Congress's power to declare war to a mere formality. Madison's argument was directed principally at countering some overstatements made by Alexander Hamilton in his "Pacificus Letters" (reprinted in part in E. Corwin, *supra*, at 8-15); Madison's argument is not properly interpreted to imply that Congress has as great a role to play in setting policy in foreign affairs as in domestic matters. Even Jefferson, who was generally disinclined to acknowledge implied powers in the federal government or in the President, wrote: "The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly. . . ." 5 Writings of Thomas Jefferson 161 (Ford ed. 1895). While we agree that Congress has some powers to curb a President who persistently pursued a foreign policy that Congress felt was seriously undermining the national interest, especially in cases where Congress's constitutional authority to declare war was implicated, well-settled historical practice and legal precedents have confirmed the President's dominant role in formulating, as well as in carrying out, the nation's foreign policy.

Britain.[6] Similarly, the First Congress itself acknowledged the breadth of the executive power in foreign affairs when it established what is now the Department of State. In creating this executive department, Congress directed the department's head (i.e. the person now called the Secretary of State) to carry out certain specific tasks when entrusted to him by the President, as well as "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department."[7] Just as the first President and the first Congress recognized that the executive function contained all the residual power to conduct foreign policy that was not otherwise delegated by the Constitution, subsequent historical practice has generally confirmed the President's primacy in formulating and carrying out American foreign policy.[8]

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[6] Proclamation of the President, April 22, 1793, reprinted in 1 Messages and Papers of the Presidents 156-157 (J. Richardson ed. 1896). President Washington also warned that his Administration would pursue criminal prosecutions for violations of his neutrality proclamation. Although such prosecutions were upheld at the time, a rule that would prohibit such prosecutions was recognized by the Supreme Court relatively soon thereafter. Compare Henfield's Case, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.), with United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). It is worth emphasizing that Presidents have sometimes encountered constitutional obstacles when attempting to pursue foreign policy goals through actions in the domestic arena, but have rarely been interfered with in taking diplomatic steps, or even military actions short of war, outside our borders. The present significance of President Washington's proclamation has less to do with the particular actions he might have taken in the domestic sphere than with his claim that foreign affairs are generally within the constitutional domain assigned to the Executive. This claim is consistent with the Constitution and has now been reinforced by long historical practice.

[7] Act of July 27, 1789, 1 Stat. 28-29. See also Act of Jan. 30, 1799, 1 Stat. 613 (similar provision currently codified at 18 U.S.C. 953), which made it a crime for any person to attempt to influence the conduct of foreign nations with respect to a controversy with the United States.

The Supreme Court, too, has recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself and that congressional efforts to act in this area must be evaluated in the light of the President's constitutional ascendancy:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority *plus* the very delicate, plenary and exclusive power of the President as the *sole* organ of the federal government in the field of international relations--*a power which does not require as a basis for its exercise an act of Congress*, but which, of course, like every other governmental power, must be

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[8] The fact that Presidents have often asked Congress to give them specific statutory authority to take action in foreign affairs may reflect a practical spirit of courtesy and compromise rather than any concession of an absence of inherent constitutional authority to proceed. For example, President Franklin Roosevelt requested that Congress repeal a provision of the Emergency Price Control Act that he felt was interfering with the war effort; he warned, however, that if Congress failed to act, he would proceed on the authority of his own office to take whatever measures were necessary to ensure the winning of the war. 88 Cong. Rec. 7044 (1942).

As one would expect, of course, Congress has not always accepted the most far-reaching assertions of presidential authority. See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Constitution did not authorize President to take possession of and operate privately owned steel mills that had ceased producing strategically important materials during labor dispute); *id.* at 635 (Jackson, J., concurring) ("[The Constitution] enjoins upon [the government's] branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment--perhaps serious embarrassment--is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful *results*.[9]

Based on this analysis, the Supreme Court rejected the argument that Congress had improperly delegated a legislative function to the President when it authorized him to impose an embargo on arms going to an area of South America in which a war was taking place. The Court's holding hinged on the essential insight that the embargo statute's principal effect was merely to remove any question about the President's power to pursue his foreign policy objectives by enforcing the embargo *within* the borders of

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[9] 299 U.S. at 319-320 (emphasis added). See also *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (President "posseses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"); *id*. at 109-112 (refusing to read literally a statute that seemed to require judicial review of a presidential decision taken pursuant to his discretion to make foreign policy); *id*. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."), *quoted with approval in United States v. Nixon*, 418 U.S. 683, 710 (1974).

In *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (citations omitted), the Court stated, "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation." The *Perez* Court, however, was reviewing the constitutionality of a statute in whose drafting the Executive Branch had played a role equivalent to one of Congress's own committees. 356 U.S. at 56. Furthermore, the statute at issue in *Perez* provided that an American national who voted in a political election of a foreign state would thereby lose his American nationality. If the President lacks the inherent constitutional authority to deprive an American of his nationality, then the *Perez* Court's language about congressional "regulation of foreign affairs" may refer only to "regulation of domestic affairs that affect foreign affairs." In any case, *Perez* should not be read to imply that Congress has broad legislative powers that can be used to diminish the President's inherent Article II discretion.

this country.[10] As the Court emphatically stated, the President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from applicable provisions of the Constitution itself.[11] As the Court noted with obvious approval, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history:

> "The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution

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[10] See 299 U.S. at 327 (effect of various embargo acts was to confide to the President "an authority which was cognate to the conduct by him of the foreign relations of the government")(quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 422 (1935) (emphasis added)). This implies that while the President may in some cases need enabling legislation in order to advance his foreign policy by controlling the activities of American citizens on American soil, he needs no such legislation for operations and negotiations outside our borders.

[11] Because the presidential action at issue in Curtiss-Wright was authorized by statute, the Court's statements as to the President's inherent powers could be, and have been, characterized as dicta. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). We believe, however, that the Curtiss-Wright Court's broad view of the President's inherent powers was essential to its conclusion that Congress had not unconstitutionally delegated legislative authority to the President. Furthermore, the Supreme Court has since reaffirmed its strong commitment to the principle requiring the "utmost deference" to presidential responsibilities in the military and diplomatic areas. United States v. Nixon, 418 U.S. 683, 710 (1974).

> and unity of design, and their success frequently depends on secrecy and dipatch."

299 U.S. at 319 (emphasis added) (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). It follows inexorably from the Curtiss-Wright analysis that congressional legislation authorizing extraterritorial diplomatic and intelligence activities is superfluous, and that statutes infringing the President's inherent Article II authority would be unconstitutional.[12]

B. Secret Diplomatic and Intelligence Missions Are at the Core of the President's Inherent Foreign Affairs Authority

The President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court has repeatedly so held in modern times. For example:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over

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[12] See e.g., United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citations omitted):

> The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

See also Worthy v. Herter, 270 F.2d 905, 910-912 (D.C. Cir. 1959) (statute giving President authority to refuse to allow Americans to travel to foreign "trouble spots" simply reinforces the President's inherent constitutional authority to impose the same travel restrictions).

> internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He _makes_ treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (emphasis in original). The Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In _United States v. Nixon_, 418 U.S. 683 (1974), the Court invoked the basic _Curtiss-Wright_ distinction between the domestic and international contexts to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the _utmost deference_ to Presidential responsibilities." 418 U.S. at 710 (emphasis added).[13]

Such statements by the Supreme Court reflect an understanding of the President's function that is firmly rooted in the nature of his office as it was understood at the time the Constitution was adopted. John Jay, for example, offered a concise statement in _The Federalist_:

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[13] See also _id_. at 706 ("a claim of need to protect military, diplomatic, or sensitive national security secrets" would present a strong case for denying judicial power to make _in camera_ inspections of confidential material); _id_. at 712 n.19 (recognizing "the President's interest in preserving state secrets").

~~Note~~ also that the _Curtiss-Wright_ Court expressly endorsed President Washington's refusal to provide the House of Representatives with information about treaty negotiations _after the negotiations had been concluded_. 299 U.S. at 320-321. _A fortiori_, such information could be withheld _during_ the negotiations.

> It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.
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> . . . So often and so essentially have we heretofore suffered from the want of secrecy and dispatch that the Constitution would have been inexcusably defective if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation.[14]

Jay's reference to treaties "of whatever nature" and his explicit discussion of intelligence operations make it clear that he was speaking, not of treaty negotiation in the narrow sense, but of the whole process of diplomacy and intelligence-gathering. The President's recent Iran project fits comfortably within the terms of Jay's discussion.

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[14] *The Federalist* No. 64, at 392-393 (J. Jay) (C. Rossiter ed. 1961) (emphasis in original). Jay went on to note that "should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them." *Id.* at 393. Jay did not, however, suggest that the President would be obliged to seek such advice and consent for actions other than those specifically enumerated in the Constitution.

C. The President Has Inherent Authority to Take Steps to Protect the Lives of Americans Abroad

Perhaps the most important reason for giving the federal government the attributes of sovereignty in the international arena was to protect the interests and welfare of American citizens from the various threats that may be posed by foreign powers. This obvious and common sense proposition was confirmed and relied on by the Supreme Court when it held that every citizen of the United States has a constitutional right, based on the Privileges or Immunities Clause of the Fourteenth Amendment, "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."[15] Accordingly, the Supreme Court has repeatedly intimated that the President has inherent authority to protect Americans and their property abroad by whatever means, short of war, he may find necessary.

An early judicial recognition of the President's authority to take decisive action to protect Americans abroad came during a mid-nineteenth century revolution in Nicaragua. On the orders of the President, the commander of a naval gunship bombarded a town where a revolutionary government had engaged in violence against American citizens and their property. In a later civil action against the naval commander for damages resulting from the bombardment, Justice Nelson of the Supreme Court held that the action could not be maintained:

> As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof . . . .
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> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the

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[15] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

> *duty must, of necessity, rest in the discretion of the president*. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not infrequently, require the most prompt and decided action. Under our system of government, *the citizen abroad is as much entitled to protection as the citizen at home*. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (emphasis added).

Later, the full Court confirmed this analysis in an opinion holding that the President has inherent authority to provide bodyguards, clothed with federal immunity from state law, to protect judicial officers, even when they are travelling *within* the United States in the performance of their duties. *In re Neagle*, 135 U.S. 1 (1890). Rather than base its decision on a narrow analysis of the status of federal judges, the Court held that the presidential duty to "take Care that the Laws be faithfully executed"[16] includes "any obligation fairly and properly inferrible [sic] from" the Constitution.[17] The Court specifically stated that these were not limited to the express terms of statutes and treaties, but included "the rights, duties, and obligations growing out of *the Constitution itself*, our *international relations*, and *all* the protection implied by the nature of the government under the Constitution."[18] As the Court pointed out, Congress itself had approved this position when it ratified the conduct of the government in using military threats and diplomatic pressure to secure the release of an American who had been taken prisoner in Europe. Noting that Congress had voted a medal for the naval officer who had threatened to use force to obtain the American's release, the Court asked, "Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?"[19] If military force may be used on the President's own discretion to protect American lives and property abroad, surely the less drastic means employed by President Reagan during the Iran project were within his constitutional authority.

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[16] U.S. Const., art. II, sec. 3.

[17] *In re Neagle*, 135 U.S. at 59.

[18] *Id*. at 64 (emphasis added).

II. Any Statute Infringing upon the President's Inherent Authority to Conduct Foreign Policy Would be Unconstitutional and Void.

Congress has traditionally exercised broad implied powers in overseeing the activities of Executive Branch agencies, including "probes into departments of the Federal Government to expose corruption, inefficiency or waste." Watkins v. United States, 354 U.S. 178, 187 (1957); see also McGrain v. Daugherty, 273 U.S. 135, 161-164 (1927). This power of oversight is grounded on Congress's need for information to carry out its legislative function. Because the executive departments are subject to statutory regulation and to practical restrictions imposed through appropriations levels, Congress can usually demonstrate that it has a legitimate and proper need for the information necessary to make future regulatory and appropriations decisions in an informed manner. McGrain, 273 U.S. at 178.

As the Supreme Court has observed, however, the congressional power of oversight "is not unlimited." Watkins, 354 U.S. at 187.[20] It can be exercised only in aid of a legitimate legislative function traceable to one of Congress's enumerated powers. See McGrain, 273 U.S. at 173-174. The power of oversight cannot constitutionally be exercised in a manner that would usurp the functions of either the Judicial or Executive Branches. Thus, the Supreme Court has held that by investigating the affairs of a business arrangement in which one of the government's debtors was interested, "the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial." *Kilbourn v. Thompson*, 103 U.S. 168, 192 (1881). The same principle applies to congressional inquiries that would trench on the President's exclusive functions. "Lacking the judicial power given to the Judiciary, [Congress] cannot inquire into matters that are exclusively the concern of the Judiciary. *Neither can it supplant the Executive in what exclusively belongs to the Executive*." *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (emphasis added).[21]

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[19] Id. The fact that such a statute may have existed, see Expatriation Act of July 27, 1868, ch. 249, sec. 3, 15 Stat. 223, 224 (current version at 22 U.S.C. 1732) (authorizing the President to use such means, short of war, as may be necessary to obtain the release of Americans unjustly held prisoner by foreign governments), does not diminish the force of the Supreme Court's statement that no such statute would be needed to support such an exercise of executive power.

[20] It is worth observing that Congress's oversight powers are no more explicit in the Constitution than are the President's powers in foreign affairs. See McGrain, 273 U.S. at 161.

It is undoubtedly true that the Constitution does not contemplate "a complete division of authority between the three branches." *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977). Nevertheless, there are certain quintessential executive functions that Congress may not exercise in the guise of its "oversight power." Congress, for example, may not give its own agents the power to make binding rules "necessary to or advisable for the administration and enforcement of a major statute." *Buckley v. Valeo*, 424 U.S. 1, 281 (1976) (White, J., concurring in part). Nor may Congress unilaterally alter the rights and duties created by a prior statutory authorization. *INS v. Chadha*, 462 U.S. 919, 951 (1983). In general, the management and control of affairs committed to the Executive Branch, even those given to the Executive by Congress itself, must remain firmly in the control of the President. *Myers v. United States*, 272 U.S. 52, 135 (1926). *A fortiori*, the conduct of affairs committed exclusively to the President by the *Constitution* must be carefully insulated from improper congressional interference in the guise of "oversight" activities.

This principle has three immediately relevant corrolaries. First, decisions and actions by the President and his immediate staff in the conduct of foreign policy are not subject to direct review by Congress. "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).[22]

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[21] On its facts, *Barenblatt* did not involve an inter-branch dispute. The Court upheld a contempt citation issued by a House Committee against a witness who refused to answer questions about his ties with the Communist Party.

[22] Obviously, Congress may investigate and consider the President's past actions when performing one of its own assigned functions (for example, while giving advice and consent to treaties or appointments, deciding whether to issue a declaration of war, or during the impeachment process).

Second, while Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs. Just as an individual cannot be required to waive his constitutional rights as a condition of accepting public employment or benefits, so the President cannot be compelled to give up the authority of his office as a condition of receiving the funds necessary to carry out the duties of his office.[23] To leave the President thus at the mercy of the Congress would violate the principle of the separation of powers in the most fundamental manner. *The Federalist* indicates that one great "inconveniency" of republican government is the tendency of the legislature to invade the prerogatives of the other branches, and that one of the main concerns of the Framers was to give the other branches the "necessary constitutional means and personal motives to resist [such] encroachments."[24] In an effort to address this problem the Constitution provides that the President's personal compensation cannot be altered during his term of office,[25] and it must be acknowledged that the President's *constitutional* independence is even more precious and vulnerable than his personal independence.[26]

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[23] The doctrine of unconstitutional conditions has pervasive application throughout the law. For a good general statement of the doctrine, see *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926):

> If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

[24] *The Federalist* No. 51, at 321-322 (J. Madison) (C. Rossiter ed. 1961).

[25] U.S. Const., art. II, sec. 1, cl. 7; *The Federalist* No. 51, at 321 (J. Madison) (C. Rossiter ed. 1961); *id*. No. 73, at 441-442 (A. Hamilton).

Third, any statute that touches on the President's inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow. This accords with the well-established judicial presumption in favor of construing statutes so as to avoid constitutional questions whenever possible.[27] Because the President's constitutional authority in international relations is by its very nature virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events, almost any congressional attempt to curtail his discretion raises questions of constitutional dimension. Those questions can, and must, be kept to a minimum in the only way possible: by resolving all statutory ambiguities in accord with the presumption that recognizes the President's constitutional independence in international affairs.

III. Statutory Requirements that the President Report to Congress about his Activities Must Be Construed Consistently with the President's Constitutional Authority to Conduct Foreign Policy.

In 1980, the National Security Act of 1947 was amended to provide for congressional oversight of "significant anticipated intelligence activities." This section now provides (section

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[26] See 41 Op. A.G. 230, 233 (1955):

> It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

[27] "[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' a court should adopt that construction." Califano v. Yamasaki, 442 U.S. 682, 693 (1979) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).

501(a) of the National Security Act, 50 U.S.C. 413(a)) (emphasis added):

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
>
> (1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

For situations in which the President fails to give prior notice under section 501(a), section 501(b), 50 U.S.C. 413(b), (emphasis added) provides:

> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the

reasons for not giving prior notice.[28]

The delicate connection between the "timely notice" requirement of section 501(b) and the President's inherent constitutional authority, acknowledged in section 501(a), is dramatically confirmed by a colloquy between Senators Javits and Huddleston, both of whom were on the committee that drafted this provision. Senator Javits asked: "If information has been withheld from both the select committee and the leadership group (as section 501(b) envisages), can it be withheld on any grounds other than 'independent constitutional authority' and, if so, on what grounds?" Senator Huddleston answered: "Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operation [sic], but would not be able to claim the identical authority to withhold timely notice under section 501(b). A claim of constitutional authority is the sole grounds that may be asserted for withholding prior notice of a covert operation." 126 Cong. Rec. 17693 (1980)

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[28] Section 501 of the National Security Act does not contemplate that prior notice of "intelligence activities" will be given in all instances. Subsection (b) of section 501 makes specific provision for situations in which "prior notice was not given under subsection (a)." Because subsection (a) includes situations in which the President provides notice to the full intelligence committees under subsection (a)(1)(A) and situations in which he provides prior notice restricted to designated members of Congress, including the chairmen and ranking members of the House and Senate intelligence committees under subsection (a)(1)(B), it seems clear that subsection (b) contemplates situations in which no prior notice has been given under either of these provisions.

(emphasis added).[29] If, as Senator Huddleston contended, section

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[29] A similar colloquy took place on the floor of the House between Rep. Boland, Chairman of the House Select Committee on Intelligence, and Rep. Hamilton:

> Rep. Hamilton: As I understand that subsection, it allows the President to withhold prior notice entirely: that is, he does not inform anyone in that circumstance. He only has to report in a timely fashion.
>
> Is that a correct view of subsection (b)?
>
> Rep. Boland: In response to the gentleman, let me say that the President must always give at least timely notice.

126 Cong. Rec. 28,392 (1980). Thus, Rep. Boland clearly, if reluctantly, confirmed Rep. Hamilton's interpretation. During the floor debates, several Senators also acknowledged that the proposed legislation did not require that Congress be notified of all intelligence activities prior to their inception. According to Senator Nunn, the bill contemplated that "in certain instances the requirements of secrecy preclude any prior consultation with Congress." 126 Cong. Rec. 13,127 (1980)(statement of Sen. Nunn). See also *id.* at 13,125 (statement of Sen. Huddleston)("Section 501(b) recognizes that the President may assert constitutional authority to withhold prior notice of covert operations . . . ."); *id.* at 13,103 (statement of Sen. Bayh).

In the course of the floor debates, some Senators stated that the situations in which prior notice was not required would be very rare. See, *e.g.*, 126 Cong. Rec. 26,276 (1980) (remarks of Sen. Inouye). Such statements are of little relevance to determining the scope of the prior notice requirement. First, the executive branch has always agreed that instances of deferred reporting will be rare and has consistently given prior notice. Second, section 501 at the very least permits the President to defer notice when he is acting pursuant to his independent constitutional authority; the scope of this authority is determined, not by legislators' view of the Constitution, but by the Constitution itself. Third, the draftsmen of section 501 decided that because the scope of the President's constitutional "authorities and duties" was in serious dispute, the legislation would not attempt to resolve the issues separating the parties to the dispute. See 126 Cong. Rec. 13,123 (1980) (statement of Sen. Javits). The ambiguities of subsection (b) reflect Congress' *inability* to override the executive branch's view of the President's constitutional authority. That dispute cannot now be settled, contrary to the Executive's position, by reference to the statements of individual Congressmen who had a narrow view of the President's constitutional role.

501(b) is to be interpreted to require the President to act on his inherent authority in withholding notice of covert operations until after the fact,[30] then any further statutory limitations on the President's discretion should be narrowly construed in order to respect the President's constitutional independence. The requirement that such after-the-fact notification be made "in a timely fashion" appears to be such an additional limitation.

The entire analysis in this memorandum supports the proposition that the phrase "in a timely fashion" must be construed to mean "as soon as the President judges that disclosure to congressional committees will not interfere with the success of the operation." To interpret it in any other way--for example, by requiring notification within some arbitrary period of time unrelated to the exigencies of a particular operation--would seriously infringe upon the President's ability to conduct operations that cannot be completed within whatever period of time was read into the statutory provision.[31] Furthermore, several putatively discrete intelligence "operations" may be so interrelated that they should realistically be treated as a single undertaking whose success might be jeopardized by disclosure prior to its completion.[32]

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[30] Senator Huddleston's interpretation is not necessarily correct. As we indicated in our memorandum of November 14, 1986, the President may be able to withhold prior notice even without invoking his independent constitutional authority.

[31] On the floor of the Senate, the bill's sponsor indicated that his personal view of the President's constitutional powers was very narrow, and that he wanted the relevant congressional committees notified "as soon as possible." He acknowledged, however, that the executive branch took a different view, and that he expected "that these matters will be worked out in a practical way." 126 Cong. Rec. 13096 (1980) (remarks of Sen. Huddleston). These statements show that the legislation was not thought to preclude the President from acting on his own view of his own constitutional powers. In guarding against such improper interference, the President's own interpretation of his constitutional powers "is due great respect" from the other branches. See United States v. Nixon, 418 U.S. 683, 703 (1974).

Thus, a number of factors combine to support the conclusion that the "timely fashion" language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification. The word

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[32] In his prepared testimony on S. 2284, President Carter's CIA Director, Stansfield Turner, stated (*National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence*, 96th Cong. 2d Sess. 17 (1980)) (emphasis added):

> Prior reporting would reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy. On the other hand, activities which would have long term consequences, or which would be carried out over an extended period of time should *generally* be shared with the Congress at their inception, and I would have no objection to making this point in the legislative history.

Turner's testimony cannot properly be interpreted to imply that all "long term," as opposed to "short term," projects require prior notice. First, Turner drew a distinction between projects involving great personal danger *or* requiring speed and secrecy and projects of long duration or with long term consequences. He did not address projects that are *both* long term *and* that involve danger to personal safety, such as the recent Iranian initiative. The inadvisability of prior reporting applies as forcefully to such a project as to "short term" projects that involve personal safety. Second, Turner was careful not to say that long term projects must always be reported at their inception: he said only that they will *generally* be so reported. In a colloquy with Senator Bayh concerning the word "generally," Turner stressed that "one has to be a little cautious" in making such a statement because "it will be quoted back from these hearings for years to come." *Hearings*, *supra*, at 32. Turner never stated that the Executive would or should give prior notice of all long term projects. Third, a distinction between long and short term projects would virtually force the President to prefer military to diplomatic initiatives in situations like the one at issue in this memorandum, which could not have been Congress' intent.

In any event, S. 2284 was not enacted, and the full Congress never had its attention directed to Turner's statements. Those statements are therefore not a significant aid in interpreting section 501(b). As we have shown, both the text of the statute and the colloquies on the floor of the House and Senate indicate that Congress did not require prior notice when the President was acting pursuant to his independent constitutional authority. In permitting "timely notice" in section 501(b), Congress made no distinction between long and short term projects, and no such distinction should be read into the statute.

"timely" is inherently vague;[33] in *any* statute, it would ordinarily be read to give the party charged with abiding by a timeliness requirement the latitude to interpret it in a reasonable manner. Congress apparently thought that the notification requirement was meant to limit the President's exercise of his inherent authority, while at the same time Congress acknowledged the existence and validity of that authority. Because the President is in the best position to determine what the most reasonable moment for notification is, and because any statutory effort to curtail the President's judgment would raise the most serious constitutional questions, the "timely fashion" language should be read, in its natural sense, as a concession to the President's superior knowledge *and constitutional right* to make any decision that is not manifestly and indisputably unreasonable.[34] This conclusion is reinforced by the nature of intelligence operations, which are often exceptionally delicate undertakings that may have to extend over considerable periods of time. The statute's recognition of the President's authority to withhold prior notification would be meaningless if he could not withhold notification at least until after the undertaking as a whole was completed or terminated.[35]

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[33] The statute uses a more precise phrase in section 501(a), where it requires that certain committees be kept "fully and currently informed" of activities not covered by section 501(b). This phrase was interpreted by the Senate Committee to mean that "[a]rrangements for notice are to be made forthwith, without delay." S. Rep. No. 730, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4192, 4199. No such interpretation was placed on the "timely fashion" language of section 501(b). See *id*. at 12, *reprinted in* U.S. Code Cong. & Admin. News, at 4202-4203.

[34] The legislative history of section 501(a) specifically indicated that "[n]othing in this subsection is intended to expand or to contract or to define whatever may be the applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative branches." S. Rep. No. 730, 96th Cong., 2d Sess. 6 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4192, 4196. Furthermore, the Senate Committee acknowledged that it was "uncertain" about the distribution of powers between the President and Congress in the national security and foreign policy area. See *id*. at 9, *reprinted in* 1980 U.S. Code Cong. & Admin. News, at 4199.

Conclusion

Section 501(b) of the National Security Act of 1947 must be interpreted in the light of section 501 as a whole and in light of the President's broad and independent constitutional authority to conduct foreign policy. The requirement that the President inform certain congressional committees "in a timely fashion" of a foreign intelligence operation as to which those committees were not given prior notice should be read to leave the President with discretion to postpone informing the committees until he determines that the success of the operation will not be jeopardized thereby. Because the recent contacts with elements of the Iranian government could reasonably have been thought to require the utmost secrecy, the President was justified in withholding section 501(b) notification during the ongoing effort to cultivate those individuals and seek their aid in promoting the interests of the United States.

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[35] Section 502 of the National Security Act, 50 U.S.C. 414, generally limits the use of funds appropriated for intelligence activities to cases in which Congress has been given prior notice of the nature of the activities. Section 502(a)(2) allows expenditures when "in the case of funds from the Reserve for Contingencies of the Central Intelligence Agency and consistent with the provisions of section [501] concerning any significant anticipated intelligence activity, the Director of Central Intelligence has notified the appropriate congressional committees of the intent to make such funds available for such activity." This provision should be interpreted to allow the President to use funds from the Reserve for Contigencies in order to carry out operations for which he withholds notice in accord with section 501(b). Section 502(a)(2)'s specific reference to section 501 should be taken to give the President implicit authorization to withhold notification of the expenditure of funds just as he withholds notification of the operation itself: to read it otherwise would mean that section 502 had effectively, though impliedly, repealed section 501's acknowledgement of the President's independent constitutional authority.

It should be noted, however, that section 502(a)(2) is clumsily drafted; if read literally, it could be taken to suggest that Congress must always be notified in advance when funds appropriated for intelligence activities are to be used for covert operations. The Conference Committee commented on the language in question by noting that it did not expect situations to arise in which there would have to be prior notice under section 502 as to the funding of an activity that did not itself have to be reported under section 501; the Committee also indicated that if such a situation were to arise, it should be resolved in a spirit of "comity and mutual understanding." H.R. Conf. Rep. No. 373, 99th Cong., 1st Sess. 19 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 952, 961-962. Accord S. Rep. 79, 99th Cong., 1st Sess. 5 (1985). Similarly, the House Committee Report indicated that "the same event . . . can be treated in the same way under new Section 502(a) and Section 501. H.R. Rep. No. 106 (Part 1) 8 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 952, 954. This supports the reasoning outlined above.

Chas. C. Cooper

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Senator COHEN. It is a fairly detailed analysis of the legislation, past legislation in question. And there is a statement on page 22 of the document—and I'll read it, Mr. Cooper—it deals with section (b) of I believe 501—its 501(a), but this pertains to section (b) of that, that subsection. And the statement is that the ambiguities of subsection (b) reflect Congress's inability, and that is underlined, inability to override the executive branches view of the President's constitutional authority. And the analysis seems to indicate that because we recognized or a concession was made that the President didn't have to give prior notice, that Congress is sensitive to the argument that Governor Boren continues to articulate so well—[General laughter.]

Senator COHEN. Having been a past chief executive, he wants some flexibility in those extrordinary cases. From my reading of the legislative history that was the argument that was made at that time, that there was going to be an absolute notice given to the Congress. Then the argument was made, that there should be some measure of flexibility and that argument was accepted in the interests of flexibility and that argument was accepted in the interests of perhaps avoiding a veto, perhaps avoiding the constitutional challenge. They said, all right, prior notice not in every case. Those extraordinary cases in which the President feels he can't give prior notice, he must give timely notice. And that timely notice, according statements you quoted, Senator Javitz and others, meant almost immediately thereafter as I read it. But Mr. Cooper has indicated the ambiguity of that subsection reflects Congress' inability to override the executive branch's view of the President's constitutional authority, and that is not I understand your testimony to mean.

Representative STOKES. That would be my position Mr. Cohen. this arrival at the words timely notice in terms of the legislative history grew out of a final compromise between all of the parties, the Administration and the House and Senate leaders who worked on this, and I did in my testimony quote some of the leaders testimony at that time. And the understanding was that in those cases there would be cases where the President just did not feel that under the circumstances he could give prior notice and under those cases they finally agreed upon the compromise that the notice would be timely. The problem we are confronted with today is that pursuant to this provision of the law, 10 months elapsed before we learned of the Iran situation, which is certainly not in anyone's concept timely by any stretch of the imagination. And I think everyone who appeared before Mr. McHugh's subcommittee admitted on both sides of the issue that this certainly was not timely notice. And I think that is what brings us to this point and I think certainly Congress now has to deal with this affirmatively in the sense of asserting its power—not only do I think there is any question of congress having the power or authority to define a period of time as opposed to the broad phrase timely notice.

Senator COHEN. You see we've gone from a two step process—what was originally conceived as a one step process, a compromise was achieved. The one step would have been prior notice by the President to undertake covert action because he in effect is trying to achieve a valid—hopefully a valid foreign policy goal without a full debate before the Foreign Relations or Affairs Committees of the Congress. So prior notice is required to these select committees. Then an exception was made saying wait a minute, in an extraordinary case give them some flexibilty. We said, OK, no prior notice in those extraordinary cases but in those extraordinary cases, we have to have timely notice. That was step two.

Now we have come to step three. Because we have assumed that the President doesn't have to give prior notice on any matter of his discretion, but if it is a highly sensitive matter, can give timely notice, but if it is really sensitive, no notice unless he decides when and if he should provide that notice.

So we have come down to a three step process under the administration's interpretation of his powers.

Representatives **STOKES**. I agree with you and I think that is precisely what necessitates our taking some action at this time to clearly define and delineate what we mean by type of notice to the Congress.

Representative **MCHUGH**. Mr. Cohen, I think you have quite eloquently expressed the reason why we have to act in this case. It was interesting before our subcommittee that no policymaker representing the Administration would defend 10 months as timely notice. And yet we have the Justice Department testifying before our subcommittee and before your committee that this was constitutionally permissible. Now if our committees and the Congress do not act in response to that legal opinion, it will stand, it seems to me, as the position of not only this Administration but possible future administrations with the concurrence, implicitly, of Congress. And unless we are prepared to accept that opinion we have to act in order to clarify what we mean when we say timely notice. And I think that is one of the fundamental reasons——

Senator **COHEN**. The fact is that had there not been a leak in the Lebanese newspaper, had there not been the Hasenfus plane shot down, we might still have this covert activity continuing today. Because, after all, a formula was proposed, 500 TOWs for 1½ hostages. Under that forumla, depending on how many they took in the future months and years, we might still be trading 500 TOWs and a few HAWKs for 1½ hostages with no notice ever being given to the United States Congress.

Chairman **BOREN**. Even more alarming, we might have a whole series of other off-the-shelf operations being financed by the proceeds from these kinds of operations scattered all over the world. Important foreign policy initiatives of this government conducted without the Congress ever being informed about it or participating in the decisions about whether or not they should be funded or carried on. The whole range of possibilities is indeed disturbing. I think that the point has been made that the legal opinion which has been handed down necessitates a legislative clarification as a very important one.

Senator Specter, any questions?

Senator **SPECTER**. Yes, thank you Mr. Chairman. Just very briefly.

Congressman McHugh, I think that you were imminently correct on the necessity for Congressional action at this time and I would put it even beyond the issue of clarification, but we must act to show we disagree with the executive assertion that 10 months is an acceptable period of time. When the Senate Intelligence Committee wrote the President in early July that we disagreed with what had happened and asked for immediate notice, he wrote back and was in agreement with a great deal of what our committee had said except that he reserved to himself the authority not to notify in exceptional circumstances, which left us worse off than before we had written him the letter.

We will be going into the constitutional issues more with Mr. Cooper and the materials you have gathered with your committee are very helpful to us. We have already taken up in some detail the issue of the potential disadvantage of a breach of secrecy and I think your testimony is very helpful since you have been in the field and have a factual basis for your conclusions that there is no realistic problem there.

I would like to turn to the other aspect of the potential advantage of the country in having the institutional wisdom of the congressional leadership, the leaders of the House and Senate and the Chairman and Vice Chairman of the Intelligence Committees, and perhaps some of that institutional wisdom might even go so far as to some members of the committee. [General laughter.]

Senator **Specter**. Who can tell under some circumstance. The constitutional rules of the cases take us so far and then it comes to the judgmental matters and what are the disadvantages and advantages on the interaction. The cases talked about reciprocity and about accommodation. My question to each of you is, given the experience on the sale of arms to Iran and also given the experience that you have had on so many other covert matters which we cannot talk about in this open hearing, how do you evaluate the potential advantage to the country in having this prompt notification, be it immediate, 24 hours, 48 hours in terms of correcting, grievous policy errors.

Representative **Stokes**. Senator Specter I think that is an excellent question. Let me just try to reply to it in this way. As we all know the President still, if he comes to us and he proposes a Finding that we disagree with, he is still the President of the United States, he still has enormous power and he can still carry out that action. The advantage of his having to come to the Intelligence Committees of the House and Senate or having to sit down with the so-called Gang of Eight is that he gets some input, some reaction in a representative capacity from those individuals as to the proposed action he wishes to take. Just as we know, and of course we can't refer publicly to them, there are occasions when we have been able to say we think you ought to ask the President to rethink this one. We think this aspect or that aspect of a particular finding is not good. Perhaps you ought to think about this a little more and come back to us again.

Ultimately the President has the authority to disregard totally what any of us say to him and proceed with his action.

Senator **Specter**. Chairman Stokes, if I may interrupt, your conclusion is based on your experience in specific cases that you cannot identify, that the institutional wisdom of your committee, and the people who know, have provided very helpful information on formulating policy, changing policy in the national interest.

Representative **Stokes**. And we do know that on many occasions it has been helpful to have had that type of advice and so I think that is what it is there for. And I think had this been done in the Iran-Contra situation, I think someone out of both committees would have said wait just a moment, this one is really bad, why don't you ask the President to think about this one again. Someone would have had enough insight or intellect to be able to say this is really bad; we think the American people would oppose this one. Think about it again. But in this case, with the Congress having no institutional input and very few individuals in the executive branch really knowing about it. If we go back for a moment to Chairman Boren's example of the off the shelf idea that Mr. North came up with, no one was going to know about it according to testimony we received, except he and Director Casey. Two men out of the entire United States who know about this off-the-shelf proposition. So at least if these things come to some other persons under normal procedure under our law, someone perhaps could have made them rethink this situation.

Senator **Specter**. Thank you very much Congressman Stokes. I would be interested in your observation of the same question Congressman McHugh.

Representative **McHugh**. Well, Senator Specter, I think your question emphasizes the most important reason why prior notification is important. The impression is sometimes given that we are insisting upon prior notification because we jealously guard our prerogatives. And of course I think we do have legal prerogatives under the Constitution which are important. But what your question suggests, correctly, is that there are very practical reasons why it is important to consult with key members of Congress who are knowledgeable in areas of foreign policy. The President can benefit from advise and consultation, and the classic example is the case of the Iran arms sales. Clearly members on both sides of the aisles would have jumped up and down if the President had proposed to them that this was a new direction in foreign policy he wished to pursue. The country would have been spared a substantial amount of damage to its interests abroad, and the President himself would have been spared a considerable amount of political damage. And so there are some very practical reasons why prior consultation is important and beneficial to the President, and ultimately to the country at large. I think that's a reason why we should insist upon prior notification except in those extreme cases where the President simply does not have time under the circumstances to consult with us before he acts.

Senator **Specter**. Thank you very much.

Chairman **Boren**. Thank you very much, Senator Specter. Senator Cohen, any last questions?

Senator **Cohen**. I can only add to what both have said with respect to the Senate, having fulfilled the same function prior to the Senator from Pennsylvania's coming on the committee, I can think of at least one occasion in which there was unanimous opposition to the very idea of a particular activity which was conveyed to the Administration. Again, we did not have veto power, we couldn't do anything to stop it. But the President in fact listened to the voices of the committee, which were very strong and unanimous, bipartisan, and I think saved the Administration from a bad proposal. So we do have a very constructive role to play.

Chairman BOREN. Let me thank you, Chairman Stokes and Representative McHugh for being here with us today and say again how much this committee values the relationship we have with the House Committee, the opportunity to share thoughts and also have our staffs work together. It has been just a tremendous benefit to the Senate Intelligence Committee. Your testimony today has been very helpful to us. We really appreciate your taking the time to be with us today.

Representative STOKES. Thank you Mr. Chairman.

Representative McHUGH. Thank you Mr. Chairman.

Chairman BOREN. Let me ask now, if I might, is it time to afford Mr. Cooper the opportunity for which he's been looking forward to with such anticipation? I know he wouldn't want me to deprive him of that opportunity of further cross examination by Members of the Committee. Let me begin with just two or three very brief questions and then I will turn to the Vice Chairman and to Senator Specter, and other members of the committee if they arrive before we finish.

As you have mentioned in your testimony, several of the items in this particular piece of legislation that we are discussing today are virtually identical to the Directives which have been given by the President to the Executive branch in appropriate Executive documents. They are also virtually identical to the language of the President's letter to this committee. So while we understand that there are certain aspects of this legislation that are controversial, there are obviously several areas in which it exactly tracks the President's letter and more or less exactly tracks the language of the Executive documents through which the President has given orders now to his own Administration. I wonder if there is any inherent objection on the part of the Administration to legislating, putting into statute, those particular items on which we appear to have common agreement?

Mr. COOPER. To tell you the truth, I can't think of all the particular items that are there.

Chairman BOREN. Well, such things as retroactive notice, no retroactive Findings, no oral Findings except under unusual circumstances. The very same provisions for reducing them to writing within the briefest time possible. Those sorts of items on which there is common agreement. What I am trying to get at is there some inherent philosophical opposition to putting these things into statute on which there is general agreement?

Mr. COOPER. No sir, I know of no such objection. I think the Administration, the President is prepared to accept those measures. It seems to me they go to further insuring that it is the President who makes this decision, that it is the Presidential mind, in other words, that is focused on the question. With respect to at least one of them, the business about retroactively, I think that simply makes even clearer what the present law makes thoroughly clear.

Chairman BOREN. It is really protection for the President. So that people in his own Administration, perhaps without his knowledge, cannot go out and undertake actions and then later ask that they be ratified retroactively. In other words, the President himself would control the process.

Mr. COOPER. Yes. While I have examined the issue of whether present law requires a writing, and have concluded on balance that I don't think it does, and you are in possession of documents that reflect that analysis, it's certainly not a frivolous argument on the other side of that question. But in any event this will be quite clear.

Chairman BOREN. The President himself, in his own letter to us, and his own internal directives made it clear that he wants it reduced to writing as soon as possible and feels that is wise so people can see the President's signature, see the written document and simply not rely upon someone else telling them that the President has approved such an action. That again is a protection for the President. So that people don't go around saying the President wants this done, perhaps without the President's knowledge. If you have the requirement of a written document, that's again a protection for the President.

Mr. COOPER. That's right. It appears, as I read and listen to the facts and evidence that came out in the hearings, that the President and his closest advisers proceeded throughout on the understanding that a written Finding would be employed. Apparently there were written Findings that were used, but were not preserved.

Chairman BOREN. Now the current statute has introductory language at the beginning which says something to the effect that to the extent consistent with the responsibilities of the President and the Congress, under the Constitution, the following things shall occur. As you know there are 2 clauses in this bill as it is now proposed, which refer to the constitutional prerogatives and powers of the President. Twice, this draft bill states that nothing in the legislation should be construed as limiting the President's powers to initiate actions that the Constitution gives him the right to initiate without prior approval. In your opinion, how would you weigh the effectiveness of this language from the point of view of a recognition of the President's inherent constitutional powers? How would you weigh the language of the current law, which begins with a general statement that the entire statute is subject to being consistent with the responsibilities of both the Congress and the President under the Constitution. How would you weigh the manner in which the constitutional acknowledgement is given under current law versus the manner in which the constitutional acknowledgement is given under the proposed bill?

Mr. COOPER. Well, obviously, I think we would prefer the version that exists in current law to the edition that has been crafted for these purposes. It is really tough to analyze the effectiveness of that provision, because in and of itself, it doesn't make constitutional anything in the bill that is otherwise unconstitutional. Acknowledging that the bill doesn't amend the Constitution is redundant to what it obtains even without any such acknowledgement.

Chairman BOREN. We cannot by statute limit the constitutional powers of either the President or the Congress.

Mr. COOPER. That's exactly right. That's the point. And to the extent that there is a provision within the statute that does that, it's unconstitutional and that is true whether there is this preambular acknowledgement or not. Now——

Chairman **Boren**. Let me ask then, as one who has made the point that I do think that there are certain constitutional prerogatives of both the Congress and the President. It is sometimes helpful to acknowledge them even in the statute or make reference to them. I gather that was the view of the Executive branch, when the current law was being written, that some reference to the constitutional prerogatives of both the President and the Congress would be wise. Is that helpful or is it not helpful or is it irrelevant? I agree with you that you cannot by statute add or detract or subtract from, as Senator Cohen has often said, the powers given by the Constitution. Is it therefore inadvisable to make any reference to the Constitution at all in the statutory enactment?

Mr. **Cooper**. It is not my view that it is inadvisable, in fact on balance, I think it would be helpful. But——

Chairman **Boren**. I now ask you the question, why would it be helpful to make reference to the Constitution?

Mr. **Cooper**. It isn't because it would make applicable the Constitution. That is applicable. References to it in a statute don't affect that one way or another. The reason that the preambular language in the existing law is useful in my opinion is because of what it suggests about congressional intent regarding the nature of the reporting requirement. It suggests a consciousness on the part of the enacting Congress that constitutional prerogatives—Presidential prerogatives and congressional prerogatives—are at play in this area and that the Congress is proceeding with an understanding of that fact. And if one then couples that recognition and the text of the statute with the evidence available in the legislative history indicating, that, yes, that was very much in Congress' mind, and it was part of a to and fro-ing between the President and the Congress on this question of what is within Congress' power, it all tends to suggest that perhaps Congress did not intend, as we believe it did not, in that statute, to place any rigid notice requirement when it said "timely" notice, but rather proceeded with an understanding that the President would make a decision based upon his assessment of the risks involved and the other factors that would obviously have to be in the President's mind.

Chairman **Boren**. It would be useful from the point of view of demonstrating congressional intent.

Mr. **Cooper**. Yes, although it wouldn't be quite as useful with respect to the proposed revisions because it is very difficult to suggest that the Congress understood and conceded to the proposition that there is an Executive privilege that is broader than a 48-hour period of time. The ability to use the preamble that now exists in connection with the proposed 48-hour limitation would be exceedingly limited it seems to me. The Congress' views are quite clear from the language that have been drafted.

Chairman **Boren**. Let me ask just one last conceptual question and then I will turn to my colleagues. The example, which you gave of an attempt by Congress, by statute, to intrude in an unconstitutional way on the powers of the President, was the strawman which you set up saying if Congress should pass a law, for example, that in the appropriation of funds to the Army, that Congress would condition the appropriation of that money upon the tactical control of certain units of the Army by Members of Congress. That would be unconstitutional. I would certainly agree with you. The President is the Commander-in-Chief and the Congress could not take upon itself the right even as a condition for appropriating funds to maintain tactical control and command over units of the Armed Forces. But what we are dealing with here is not something that goes to that point at all. The more apt analogy would be whether or not the Congress in appropriating money to the Army might require reporting back as to how those funds were utilized and the tactical commitments that were made in the utilization of those funds. Merely a reporting requirement, not any attempt to exert any kind of tactical control or command or to invade the powers of the President and Commander-in-Chief. In fact, it has been made very clear in the statute that the statute is not seeking to limit the ability of the President to act. The President may act. His actions would not be subject to congressional veto or veto by the Intelligence Committees of his right to initiate action. The only thing we are talking about here is solely notice. So it is a very, very different thing than the kind of analogy that you drew to Congress trying to in fact, direct certain action which belonged to the Executive sphere. Now it sounded to me that you admitted that there was no absolute right to withhold notice and that the longer the withholding of notice goes, the more you believed the constitutional prerogative begins to erode. You feel there is a stronger right to withhold initially, than there is over a long period of time, in general.

Mr. COOPER. In general, yes.

Chairman BOREN. So you are developing some sort of a good faith test here, and a balancing of interests in terms of the right of the President to withhold notice for the sake of, let us say, preventing loss of life or damage to some intensely important national interest, against the right and need for the Congress to be informed. Simply to have notice.

Mr. COOPER. The point really, Senator, is that the risk analysis is not a static one.

Chairman BOREN. Yes, I understand that. In other words we are dealing with risk analysis. I think everyone admits that it was not appropriate, I will not go into a constitutional argument here, it was not wise or appropriate for the President to have withheld notice for 10 months, in the Iran-Contra matter. But in trying, I have a hard time in understanding how you could apply this good faith balancing using risk analysis when most covert actions involve relatively large numbers of people in the Executive branch. Also, those who have dealt in operations in the past have indicated to me that we are nearly always dealing with large numbers of people who are probably not even Americans on the operational end. A lot of times you are dealing with informers, expediters, and others in order to get something done, if it is an operation of any scale. How would you demonstrate that you have significantly increased the risks of disclosure after scores of people both inside and outside the government, are notified by giving such notice to a group of eight people who have been selected by their own peers in the Congress to exercise certain special responsibilities?

Mr. **Cooper**. Senator, I think it would be in the future, and I know it has been in the past, a rare occasion in which a President has come to the decision that the disclosure we are talking about to the so-called Gang of Eight represents an additional risk, and particularly that it represents an additional risk that he cannot, in the exercise of his conscience and his judgment, run. As I understand it, people who had reason to know in the previous Administration, in the Carter Administration, have testified to the effect that it happened on the order of three times throughout that 4 year period. In this Administration, I think there has been testimony by people who have reason to know, I certainly do not, that it has happened only on this one occasion. Presidents, quite rightly, and wisely, want the counsel and the support of the Gang of Eight and the Intelligence Committees. In the routine of covert intelligence operations, if there is such a thing as routine, they wisely seek that counsel and that support for all the reasons that the previous two witnesses identified, with which we obviously, entirely concur. But, in certain circumstances, at least two Presidents have determined that there would be an additional risk; and it seems to me that the Congress and even this committee recognize that every time an additional person is added into the charmed circle, so to speak, of people who with whom the facts will be shared, that some additional risk is run. That isn't an expression of doubt that the members of this body who would be entitled to that information would not safeguard it as much as possible. And it certainly is no suggestion that leaks don't happen every day in the Executive branch. I'm quite unwilling to make any such claim as that.

And I'm willing to stipulate to the proposition even that there are Members of Congress who are more responsible in terms of safeguarding information than some members, perhaps, of the Executive branch. But the fact is, the President has to decide "who do I have to share this information with in order to accomplish my aims. Who must I share it with." He's got to share it with the individuals within his Administration who would operationally conduct the project, else it's not going to be done. There may be people downstream with whom he must share it. He may not trust them, but those are risks that if the thing's going to go forward, he must take. Now in all but these very rare circumstances, Presidents have concluded that they also ought to take the additional risk of bringing in at least eight more people to this project. But for what reason? So he can have that advice. It may well be that a President would determine that as much as he wants that advice, he knows what he is doing, he knows what he is going to do and is going to proceed regardless of the advice he hears. As I understand the circumstance that that this body has examined recently, the Secretary of State and the Secretary of Defense were advising the President in a manner contrary to the decision that he took. Of course it was his decision to make, however. He's got to make it, regardless of the advice that he gets, according to his own conscience and his own judgment. It may well be that he would not have made that decision had he heard the Gang of Eight, but it may well be that he would and he's got to undertake that analysis.

Chairman **Boren**. Absent enactment of a statute like this which imposes some definition upon the term timely notice, what would prevent a future President from doing exactly what was done in the Iran-Contra matter, taking the exact same action and withholding notification for 10 months or perhaps forever because we don't know what would have happened had this not leaked in a Lebanese newspaper. I think we all sincerely believe that had the two committees been notified, or had the Gang of Eight been notified, that the response of that group coupled with what we know was already the advice of the Secretary of State and the Secretary of Defense, would have been not to undertake this operation. Most of us believe we could have spared the President of the United States great damage and that we could have made the last year of his Administration that we've just been through much more productive for him and for the country if there had been such notification. So it's not a matter of fixing blame. It's not a matter of looking back and trying to rehash the arguments pro and con. There is a sincere feeling not only are we asserting congressional prerogatives, but that we could have all spared our country and spared our President a great deal of anguish and the aftermath of a serious mistake had this notice been given. Absent some sort of statutory enactment, given your own legal opinion which you have expressed in the document that Senator Cohen has entered into the record, what is there to prevent a future President from asserting the very kind of privilege you say he has the right to assert and to withhold notice for 10 months and to undertake another Iranian arms sale and have it not come out unless it happened to be leaked by a newspaper? What is to prevent that if we don't take that action?

Mr. COOPER. Senator, I am not sure—I've not given thought to that precise question and so I can't tell you—I can't advise you that there is some particular statutory formulation that would tighten up the existing statute and yet not encroach on what I believe is the President's irreduciable authority, inherent Constitutional authority in terms of maintaining the confidentiality of a Presidential decision. I do think that so long as I retain the view that there is some irreduciable minimum Presidential authority on which Congress cannot legislate, then I think the only thing that in the end can be relied on is the Constitution itself and an individual President's conscience and his judgment and his devotion to abiding by the Constitution. There will be a time in the anaylsis when it is not a reasonable Presidential decision to continue to withhold the information. It's just—it's not something, however, that I think can be measured by a fixed number of hours.

Chairman BOREN. Thank you again, for being with us. I'm going to turn now to Senator Cohen for his questions.

Senator COHEN. Mr. Chairman, I'll try and be relatively brief, Mr. Cooper. Mr. Cooper, we've kept you a long time. But there are some issues I'd like to explore pertaining to your most recent statements concerning power. It seems to me we have two issues. One is policy, the second is power. Is it good policy on the part of the Administration to carry out, to initiate and execute covert activity without seeking the advice and not consent, but advice of Members of Congress. And from a policy point of view, I found it extraordinary that we found ourselves in the position that the President through this covert action dealing with Iran notified in one fashion or another, Mr. Ghorbanifar, who was regarded as a sort of pathological liar by the Central Intelligence Agency, Misters Secord and Hakim who didn't have security clearances, Mr. Khashoggi who gathered information indirectly about the operation, two Canadian businessmen who were funding $10 million up front, so-called Iranian moderates, who were taking the arms and turning them over to the revolutionary guards a second channel who reported to the first channel—*the first channel*—it went on and on in terms of those people who were in fact put on notice about this activity. But, eight Members of Congress, the leaders of the institution, could not be trusted with this information. From a policy point of view I think that is extraordinary that we found ourselves in that position. Second, from a power point of view, what you are saying is that the President has exclusive power to initiate and execute covert activity and to maintain its secrecy, and that that power cannot be reduced by any act of Congress. I think in essence that is what you just testified to about not reducing the President's power to maintain the action and its confidentiality. Is that correct?

Mr. COOPER. Senator, I do think that with respect to actions that the President is constitutionally obligated to take—from whatever constitutional source and in whatever area, but particularly in the national security area—he is also privileged, to maintain if he must, the confidentiality of the action until such time as, for the reasons we already discussed, that privilege abates.

Senator COHEN. From a constitutional point of view, it seems to me, in response to Senator Boren's question, you indicated that because Congress made a concession initially in recognizing the President's constitutional powers or prerogatives, not to give prior notice, but to give it in a timely fashion, implicitly Congress recognized the exclusivity of the President's ability to determine what timely notice means. I think you've said that in essence. The implication was that by recognizing that he does have constitutional powers and his ability to withhold prior notice, Congress implied that we also recognize that he is the one to determine timely notice, what the definition of timely notice would be. So from a policy point of view, it would be in our interest, those of us who feel that he does not have the sole discretion to determine what constitutes timely notice should eliminate any reference to the President's constitutional authority to withhold any information, any prior information. Do you not follow?

Mr. COOPER. No, I follow you. I think it would be in your interest if you reject the Executive privilege proposition that the President asserts.

Senator COHEN. So in other words, those of us who feel that the President doesn't have exclusive authority to define timely notice should strike any reference to the President's constitutional authority to withhold prior notice. That would be strengthening our own position. Any recognition on his part that he has some flexibility to withhold prior notice necessarily gives the store away by saying since you recognize the ability to withhold prior notice, you have therefore given us the recognition that he can in fact withhold timely notice until such time as he determines that it is safe to tell the Congress.

Mr. **Cooper**. I don't think it necessarily gives the store away, but I think it certainly takes one argument out—you will not hear it down the road.

Senator **Cohen**. So any concession to the President's constitutional power to withhold prior notice weakens the case of those who maintain that he doesn't have the ability to define timely notice subject to his sole discretion.

Mr. **Cooper**. I'm sorry, I didn't follow that.

Senator **Cohen**. Any concession that we make that the President can withhold prior notice necessarily implies that we recognize that he is the sole determinent of timely notice.

Mr. **Cooper**. Oh, I'm sorry. I'm not certain that that would follow.

Senator **Cohen**. But that is what you have written in the document that I have in the record. You've written in a very extensive footnote that Congress recognized implicity that because a President has the constitutional power to take action and not give prior notice, that he in fact is the sole determiner of what timely notice is. So for those of us who disagree with that, we are much better off taking out any reference to the President's ability to withhold prior information. I'm just trying to take your logic and see whether or not it applies.

Mr. **Cooper**. Well, I guess I'm focusing more precisely, at least as I understand your point. I'm not certain I agree with that characterization of the opinion. Are you referring now back to the footnote that you discussed——

Senator **Cohen**. The footnote on page 22 of that extensive memo that you wrote about a year or so ago.

Mr. **Cooper**. Yes. Well, I have that footnote close by.

Senator **Cohen**. I'm reciting it from memory here, but I will try to get the precise language. On page 23 you go on to say the entire analysis in this memorandum supports the proposition that the phrase in a timely fashion must be construed to mean as soon as the President judges the disclosure to congressional committees will not interfere with the success of the operation.

Mr. **Cooper**. Right. I don't think that conclusion, however, flows singularly from the point you are making. It is a conclusion that flows from the totality of the discussion that precedes it. It rests on two essential points. First of all, that the statute is constructed in such a way and the legislative history reveals, consistently with the structure of that statute, that there was a congressional and presidential recognition that there is an Executive privilege component of these decisions. And because we in our opinion agree with that as a constitutional premise, then that has implications for how one interprets the phrase timely notice. It was a phrase that came about by virtue of compromise between the Executive and Congress, with the whole Executive privilege debate that we are now having as it's background.

Senator **Cohen**. But what happened, it came about as a compromise with Congress on the issue of prior notification. The compromise was that Members of Congress said we want to know in advance so we can have at least some input, some advisory capacity in which we can serve.

Mr. **Cooper**. Yes.

Senator COHEN. And that was the area of dispute. They said there might be some extraordinary circumstances where he can't give you or will not give you prior notice. And they made the concession. Alright in those exceptional circumstances where prior notice is not given, it has to be a really extraordinary circumstance, then we will have timely notice. Now we are down to step three because we've already assumed that there are circumstances with no prior notification, now we are down to timely notification and now we are into a third category of timely notification and those extraordinary circumstances where we will determine, well beyond any conventional notion of timely notice, that it goes weeks, months, years in which the President decides.

Mr. COOPER. OK, I follow you better.

Senator COHEN. What we did by recognizing that there might be some extraordinary circumstances where you don't give prior notice, was imply that the President is the one who solely determines the definition and parameters of timely notice.

Mr. COOPER. Well, it seems to me also, that that debate, and it's been a while since I've canvassed it, but in just glancing back over the excerpts from it that are in our opinion, that debate wasn't exclusively limited to prior notice, but included as well as the inability of Congress and the President to agree on what kind of limitations could be placed on notice even if it isn't prior notice. In other words, what notice after the fact is within the range of Congress to insist upon in a statute? Leaving it in a way that is not rigid and precise was the product of their inability to agree on anything that was rigid and precise.

Senator COHEN. Let me move on to page 3 of your testimony. You made a statement, you said:

> Equally important such requirements raise important practical concerns about the United States' ability to operate an effective intelligence service. I'm not the best person to address these latter concerns.

Whom have you spoken to where the requirement of 48 hours notice would in fact impair our ability to operate an effective intelligence service?

Mr. COOPER. The source of that sentence is a frank recognition that I'm not an expert in intelligence activities and their operational requirements and what have you.

Senator COHEN. Who would be in the best opinion to give that assessment? Would someone like the Director of Central Intelligence Agency?

Mr. COOPER. Oh yes.

Senator COHEN. Or the Deputy Director of the CIA?

Mr. COOPER. I should think that individuals who are expert in this so-called intelligence community would be the people that I would look to for that kind of advice.

Senator COHEN. During his confirmation proceedings, Judge Webster was asked that question. And he stated, I think without qualification, that he could not imagine a circumstance in which he would not come to the Hill to notify Congress within a matter, I think he said, several days. And we tried to focus that down to 48 hours. Bob Gates, during his confirmation hearings, said 48 hours. Couldn't conceive of a situation. So those two experts in the field of intelligence service had no problem with this impairing their ability to be an effective service. The Deputy Director who will be testifying next week spoke with Senator Boren and myself yesterday, and said that he could see no circumstance under which the 48 hour notice would impair the ability of the service to function effectively. So I am wondering where the allegations came from that somehow, and I must say Director Webster presented a different view about a week ago which we will declassify and make public soon, that somehow that this would not impair the service's ability to function effectively. There's been something of a turn around in the last few weeks. I'm just wondering where this assessment is coming from. I don't know where it is supported in fact or by evidence or by testimony.

Mr. COOPER. In terms of my own personal involvement in this area, and the information that I have received from knowledgeable people, it is limited pretty much to the inter-departmental examination of the August 7 letter to Chairman Boren and the policies that were considered in connection with that letter.

Senator COHEN. What I am suggesting is that there is no evidence in fact, to support the statement that a 48 hour notice requirement will in effect diminish in any way an ability to operate an effective intelligence service.

Mr. COOPER. Well Senator Cohen, I guess my point is I have not heard anyone concede the point you are suggesting. You say, and I don't dispute, that Judge Webster made the points that you have described. And that may well represent his views on the matter. But with whom in the Administration in my experience, the people I have been dealing with and the national security apparatus feel strongly that this is not a provision that a President could concede because it's simply not inconceiveable that a President would have to come to the constitutional judgment that he doesn't want to abide by it.

Senator COHEN. Well, let me take this in conjunction. I assume you are familiar with a speech given by Mr. Bradford Reynolds, who is councilor to the Attorney General. You work fairly closely with Mr. Reynolds.

Mr. COOPER. I do, very closely, but I don't think I know the speech you are referring to.

Senator COHEN. Well, the speech was given before the Federalist Society, November 6, 1987, and I have a copy of it. There were certain paragraphs that caught my attention as I went through it. Page 6, for example, there is a statement that the demonstrated inability of congressional committees to preserve the confidentiality of such communications and to keep secrets generally compounds the problem immeasurably. And again, I wonder what is the basis for allegations such as that or statements such as that, especially when you have somebody like Mr. McMahon who will testify that he knows of no circumstance under which a member of the committee has ever disclosed a covert activity.

> As witness with the fall of the Shah of Iran, the takeover of the U.S. Embassy in Tehran, the subsequent developments in that part of the world, the President's ability to protect vital American interests and American lives has been hampered by the weakening of this country's intelligence gathering capacity, due in no small part to congressional interference.

Again, I am wondering how statements such as that are made to support, in essence, the kind of statement you are making before us that would have the power remain exclusively within the presidency by pointing to congressional deficiencies in the field of keeping secrets. I just don't—I don't think it is supported by the facts, but these arguments are used to justify a position which I frankly find untenable in stating that the President has the exclusive jurisdiction, not only to initiate the action, but to keep it secret. See, that is the problem I am having in trying to understand what the objection is.

Mr. COOPER. Well, two points. First, I really can't speak to those passages, because as closely as I work with Mr. Reynolds, I was not acquainted with his remarks before your reading them just now. I spoke myself at the Federalist Society on that occasion, but at a different time.

Second, I don't understand you or anybody else to be saying that the President can't keep these things secret. Obviously they have got to be kept secret. The question is just who the President must bring in pursuant to congressional legislation. Everybody recongizes these activities generally have to be kept secret.

Senator COHEN. It is a question of who and when. Let me just move on. I want to give Senator Specter enough time certainly to pursue some of the constitutional issues. But just a couple more in terms of getting your thoughts.

You said the President should have the sole discretion to determine when it is right or appropriate to notify Congress, as a matter of constitutional power, right?

Mr. COOPER. Yes, sir, I think that is a generally accurate statement.

Senator COHEN. Could you conceive that there would be a situation in which the covert action has been completed but the third parties or countries that have been utilized to carry out that covert action say, Mr. President, we are willing to help you out in this particular case. If you reveal the existence of this covert activity to members of Congress, it might in fact jeopardize our ability to function in this part of the world again, or to aid you in the future and therefore I am asking you not to notify the Congress, even though the action has been completed.

Mr. COOPER. I think that would represent a different and tougher case than the case that Stansfield Turner cites. I really don't have a definitive judgment on that. I think it would require a lot of consideration, a lot of study.

Senator COHEN. You can't say, well, the President would be justified in withholding notice of a covert action as long as there was that kind of a problem presented to him about the notification jeopardizing the nature of the relationship of that third party or country's ability to continue to be of assistance?

Mr. COOPER. Well, based solely on that presentation of the circumstances, it seems to me it would be a stretch for the President to rely upon that kind of circumstance, to fail to abide by congressional expectation and desire for information related to a matter that was completed. But by the same token, I think that hypothetical can be added on to with all kinds of other circumstances that are not utterly far fetched and inconceivable, that would make a

President pause for a very long time before he made disclosures in light of the damage to American interests as opposed to third party interests, that might be implicated by not, acceding to such a demand. I just don't know. I don't think that is something I would be prepared to say yes or no to.

Senator COHEN. Just one final question, Senator Specter.

What if there were a situation where the President didn't have any money available with which to carry out a covert activity. And funds had not been appropriated for that purpose. Could the President, in his exercise of this exclusive power, take money from one appropriated account and move it to another, and carry out the action and then later notify at some future undefined time the Congress he had done so in the exercise of the national security of the country?

Mr. COOPER. I am instinctively resistant to that proposition. I have never thought about it before now, but it, I would think, is a doubtful one.

Senator COHEN. Could the President call upon third countries to provide the funds necessary to carry out the covert action?

Mr. COOPER. Oh, you mean our own covert action?

Senator COHEN. Our covert action funded by a third country, without notifying Congress.

Mr. COOPER. I think that he could not in the face of a statute that foreclosed that kind of financing of American employees and officials. I do think, however, that a President cannot be limited in his ability to seek to have allies and friends join in his policy.

Senator COHEN. It is not a question of whether he can be limited in doing that. It is a question of notifying Congress that this has been done.

Mr. COOPER. Oh, to notify Congress that this has——

Senator COHEN. A covert action has been carried out with the assistance of X, Y, or Z country.

Mr. COOPER. If it was within his authority to do it, if there was no statutory prohibition on it, then I would not see why that would be a distinction——

Senator COHEN. If there is a statutory prohibition, could the President carry out a covert activity that contravened that statutory prohibition?

Mr. COOPER. I would think that would be a doubtful prohibition, that he could.

Senator COHEN. Well, isn't that what was cited during the Iran-Contra affair, that the opinion, written by former Attorney General William Frank Smith said that Director Casey could, in fact, transfer arms to a country that was barred by law from buying arms from the Defense Department by making the action covert. Isn't that what was cited during the Iran-Contra as authority to do that?

Mr. COOPER. Yes, it was, but Mr. Smith was not relying on inherent constitutional powers. And our opinions, the opinions I have cited, certainly do not rely on inherent constitutional powers for that proposition. We rely instead on what we believe is a parallel congressional authority to transfer arms, apart from the restrictions of the Arms Export Control Act. If it wasn't available, if it was not available, the President would have to abide by the Arms Export Control Act, whether he operated covertly or overtly.

Senator **Cohen**. Well, what happened in that case is that they took half of William French Smith's opinion about being able to rely upon statutory authority and go through the national security, and then they took the other half of the Constitutional authority and said, but you don't have to notify Congress.

Mr. **Cooper**. Well, the thing——

Senator **Cohen**. In other words, you have a public law that says you can't do this. We say well, here's a way we can do it. Let's go covert. And then they said we will rely upon the President's constitutional power. And now having gone covert in contravention of the public law, we don't have to give notice under the constitutional authority inherent in the President's position. So there was a merger of the two. Here's the statutory ability to do it, and here's the constitutional power, and no notice given, 10 months expires, and we have, in effect, the mess that we are faced with.

Mr. **Cooper**. Let me explain my response to the interplay of the Smith opinion and what ultimately was done in this instance. This Smith opinion says the President doesn't have to abide by Arms Export Control Act requirements if he invokes this other authority, this other congressional authority to transfer arms. But this other congressional authority to transfer arms—which is the Intelligence Act—carries with it a notice requirement—a notice requirement. And Mr. Smith quite properly made known to the President that he should be aware of that notice requirement. I assume that the notice requirement was abided by with respect to that particular covert operation, the details of which are still classified.

But in this instance, we did the same thing. We said this other statute, the Intelligence Act, is available. The other statute has a notice requirement. However, the whole notice requirement says you don't have to give prior notice, you may give timely notice, and that was the advice that the President got. That the President decides that the risks are such that he will notify in an earlier covert operation, obviously doesn't foreclose him from deciding that the risk analysis is entirely different in a subsequent covert operation.

Senator **Cohen**. No, I think not that the risk was such that he did notify in the prior case; I think the Smith opinion was you can do it this way, but you have to give notice.

Mr. **Cooper**. Yes.

Senator **Cohen**. So they cut it in half, saying you can do it this way, but over here, because of your constitutional power, you don't have to give notice. That is the way in which it was handled. You merged the two.

Mr. **Cooper**. It was—that is really not sufficiently nuanced, Mr. Vice Chairman.

Senator **Cohen**. You're sounding like General Haig, now.

Mr. **Cooper**. Oh, please.

The point is, it wasn't just constitutional authority that we relied upon, or that Attorney General Meese relied upon, when he said—way back in November 1985—that this statute doesn't contain, an iron requirement that you provide prior notice. In fact, he advised that by following the statute and its requirements faithfully, the President does not have to provide prior notice. He may provide timely notice. And what we are arguing about is whether or not the timely notice requirement was abided by, as opposed to whether or not the statute was somehow ignored. It was not ignored; it was interpreted in a way that there are some disagreements about, to be sure.

Senator **Cohen**. Thank you, Mr Cooper.

Mr. **Cooper**. Yes, sir.

Senator **Cohen**. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Cooper, I have waited patiently for an opportunity to question you. We have started this hearing more than 4 hours ago and the questions that I have for you are really very involved. There has been no luncheon break and I do not think it appropriate at this time to undertake the questioning. I think that we violate your constitutional rights, re grilling, under Ashcraft versus Tennessee.

Mr. **Cooper**. No problem.

Senator **Specter**. It's time for food and water.

Mr. **Cooper**. You'll get no constitutional argument on that.

Senator **Specter**. We can agree on at least one constitutional principle, your rights under the premises.

Senator Dole has scheduled a session at 1:30—it is now 1:44—with National Security Councilor Colin Powell, and I would like to attend. So what I would like to do in just a few moments is to pose some questions for written answers. Perhaps there will be another hearing. I think that might be helpful. I'll discuss that with the Chairman and the Vice Chairman. But in the course of just a few minutes to try to bring the hearing to a close, I would like to pose a number of concerns and questions, because I believe that if there are strong arguments for the President's constitutional powers, they haven't really been articulated in the statement which you prepared. I know how busy you are, and I would ask you to reconsider some of the positions which you have taken.

Starting off with the issues relating to Congress' power, you said in your testimony that Congress has the power to regulate commerce. And of course, that is a specifically enumerated power under Section 8 of Article 1, and I would like your comments in writing about the congressional power to regulate commerce as it relates to the sale of arms to Iran, considering the extensive congressional powers in related fields.

You testified concerning your conclusion that there was not absolute executive privilege under—I have just been handed a note which says questions for-the-record could give the Administration reason to delay the markup beyond next Wednesday.

Senator **Cohen**. The Chair was going to suggest that the answers should be provided before next Wednesday.

Senator **Specter**. Answer them as best you can.

Senator **Cohen**. In a timely fashion to be construed as 48 hours after you have received them.

Mr. **Cooper**. Fair enough. We will obviously——

Senator **Specter**. You had commented that there was not absolute executive privilege, citing U.S. versus Nixon, and then talked about state's secret prong and the national security prong. If I understand you correctly, you rely upon United States versus Nixon in terms of their reports reference to national security and state's secrets.

I would submit that you misread that case, because the issue of executive privilege, as the court sets forth on page 703, relates to the contention of confidential conversations between a President and his close advisors, that it would be inconsistent with the public interest to produce. Here we are not talking about any conversations involving the President and his advisors. We are talking about the President's authority, constitutional authority to decide not to disclose to Congress what he is taking up under covert activities. So I would like your focus on the aspect of executive privilege, if I am correct, that you are relying upon. And I think really that case just is not applicable.

You cited, in your written testimony, the references to the Jay Treaty. And I think that really supports the legislation which we are urging here. In U.S. versus Curtiss-Wright, the court refers to the fact that President Washington declined to give to the House of Representatives materials relating to the Jay Treaty, but inferentially gave them to the Senate. The Supreme Court refers, at page 321 of 299 US, to the necessity for caution and secrecy was a cogent reason for vesting the power in making treaties in the President with the advice and consent of the Senate, the principle on which that body was formed, confining it to a small number of members.

My question for you is if that kind of secrecy is envisaged under U.S. versus Curtiss-Wright Corp., are you satisfied with the smaller number of members in the Senate, which was always more than 8? At the time of the founding of the country, of course, it was 26, and has grown ever since. Do you have an appropriate delimitation with the approach in the bills which we are considering to the Group of Eight?

The other issues that I would ask you to respond to in writing relate to Congressional powers under Section 8, specifically the power to make rules for the government and regulation of the land and naval forces. Now, that is separate from the apropriation power, to raise and support armies. And it seems to me that the congressional authority explicit in the Constitution to make rules for the government and regulation of the land and naval forces applies directly to authority to make rules for governmental operation on covert activities.

Now, it is true that we don't specify the CIA here, but neither do we specify the Air Force. There is no doubt that the Constitution applies to the Air Force as well as the Army and the Navy. And I would like your observations if you think that there is any explicit authority, or congressional power to make rules, which is what we are really trying to do in 1721 and 1818.

The congressional power in this field specifically was recognized in the 1970 National Security Act, and I would ask for your consideration as to the authority for that act being applicable in this field. And I would also like you to take a look at the case—it's a very old one—but Little versus Merrime, an opinion of Chief Justice Marshall which goes back to 1805, 2 Cranch 170, taking up the limitations of the President involving his authority to direct the Navy when there have been congressional limitations.

And finally, I would ask you to comment or perhaps even rethink, some of the very broad assertions of authority which you have in your written statement. I refer to page 4 on Article 2, Section 1, which states the executive power shall be vested in the President of the United States, and saying, as you do, this clause has long been understood to confer on the President the plenary authority to represent the United States to pursue its interests outside of the borders of the country. I would ask you if you don't think you ought to reconsider that, tell us what the authority is, especially in light of the case that I cited in my brief opening statement on Japan Whaling in 1986, which puts Congress even ahead of the executive power as the Supreme Court articulates authority in foreign affairs.

Also your statement later on page 4 of your prepared testimony, which states that since the beginning of the Republic it has been recognized by Presidents, Congresses, and the judiciary, that the Constitution vests in the President broad and exclusive responsibilities in the field of foreign affairs. And I would ask you to reconsider that. Or, if you stand by it, to provide some authority for that. And again, especially in the context of the decisions of the Supreme Court such as Danes versus Moore and Moore versus Regan, a 1981 decision which picks up the language of Justice Jackson's concurrence in Youngstown Sheet and Tube Company.

And I would commend to your view one other case. A very thoughful opinion by the District of Columbia Circuit in United States versus American Telephone and Telegraph Company, which involves the interaction of Congress and the executive branch in a case which was decided in the District Court and taken to the D.C. Circuit and remanded for further consideration, trying to work out a settlement. It went back to the Circuit Court where the Court came to the conclusion, saying, quote:

> The executive would have it that the Constitution confers on the Executive absolute discretion in the area of national security.

And this does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of Commander in Chief and the power to make treaties and appoint ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces, and in the case of the Senate, consent to treaties and the appointment of ambassadors. And then the Court goes on a little later, page 128 at 567 Fed. 2nd, quote:

> But the degree to which the executive may exercise his discretion in implementing that concern is unclear when it conflicts with an equally legitimate assertion of authority by Congress to conduct investigations relevant to its legislative functions.

Mr. Cooper, these are very complicated questions, and to have a discussion with you would take some considerable period of time. I don't think it is practical to do at 1:55, considering how long we have been in session. And you are under obligations.

I would also ask you to consider the two factual matters that I have questioned the witnesses about and give me a comment on them, in terms of any evidence—and you could submit this in camera—hard evidence about the potential disadvantage of breach of security, breach of secrecy, by the eight congressional leaders.

And I would also like your observation on the testimony you've heard from the witnesses here today about the potential advantages to the country in having the institutional wisdom of the leadership of the Congress and the Chairman and Vice Chairman of the committee.

Now, that is quite a—those raise a fair number of issues, but I would be very appreciative if you would address them. The statement which you submitted, I know you have got a lot of things to do, and I don't know if you can really digest this kind of a request between now and Wednesday, but if we are to give serious consideration to the claim of constitutional executive prerogatives, I think we need more authority, or at least speaking for myself, I do on my reading of the constitution provisions of the cases.

Mr. COOPER. Senator Specter, we will begin immediately to formulate answers and detailed, thoughtful ones, to be sure, on all the questions that you have outlined. I think they are good questions.

Senator SPECTER. Thank you, very much.

Senator COHEN. Thank you, Senator Specter. We will look forward to receiving your answers to those very important and I think pertinent questions.

I might say that you are living witness—evidence, I should say, to the fact that Senator Specter and other members of this committee feel that a Bill of Rights is not necessary to adopt on behalf of witnesses, that we did not want to inflict cruel and unusual punishment, and deprive you of a chance to have a bit of late lunch and nourishment.

And thank you for coming here and accommodating our schedules, we've had a number of interruptions with votes and other meetings and so forth, but we appreciate your coming here.

One final word. I have been advised that some in the Administration are putting a full court press on various members of this committee to prevent us going to mark-up next Wednesday. I hope that effort is not successful. This has nothing to do with your testimony, Mr. Cooper, but others who are charged within the Administration of trying to delay the committee from going forward next week. We intend to proceed and to complete our deliberations by next Wednesday, so that the Bill can be ready for consideration at the beginning of next year.

But once again, thank you, very much. You have been most accommodating and helpful.

Mr. COOPER. THANK YOU.

Senator COHEN. The committee will stand adjourned.

[Thereupon, at 2:00 o'clock p.m. the committee was adjourned.]

[Mr. Cooper's written response to Senator Specter's questions follows:]

WRITTEN RESPONSE OF CHARLES COOPER TO SENATOR SPECTER CONCERNING TESTIMONY ON DECEMBER 11, 1987

Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

Thank you for giving me the opportunity to respond to your oral questions concerning my testimony on Friday, December 11, 1987. My office asked a member of your staff whether your office wished to submit written questions based on your statements. Your staff said it did not, and sent me the transcript of your remarks. Accordingly, I have restated each of your questions to the best of my understanding before setting forth my response.

Before addressing the legal issues raised by your questions, let me respond to the two policy questions you asked at the end of your statement. First, you asked for "hard evidence" of breaches of secrecy by the eight congressional leaders. I am not personally aware of any such breaches because I am not involved in the conduct of intelligence operations.

Second, you asked for my opinion on the value of consultation with the congressional leadership prior to the initiation of covert operations. Although I would again disclaim any expertise in this area, it seems obvious that congressional input would often be of great value. Not only would the President receive the advice of some of our most experienced political leaders, prior consultation may generate the political support for the President's foreign policy initiatives that is indispensable to their success. For these reasons, President Reagan has recently reaffirmed his commitment to a policy of consulting with members of Congress on matters of foreign policy.

1. Q: How does Congress' power to regulate foreign commerce relate to the sale of arms to Iran?

A: Article I, section 8, clause 3 of the Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations . . . ." This power is plenary and would authorize Congress to prohibit the sale of arms to Iran or to any other country. As I noted in response to a question from Senator Cohen, the fact that such sales would be useful to a foreign policy initiative of the

President, whether overt or covert, would be of no avail in the face of a congressional exercise of its foreign commerce power.

In the case of President Reagan's transfer of certain weapons to Iran, the President was acting under statutory authority of sections 101 and 102 of the National Security Act of 1947. This authority was recently recognized by Congress in Section 403 of the Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, 99 Stat. 1002, 1006 (1985). An extensive discussion of this authority is contained in my memorandum for the Attorney General, Re: Legal Authority for Recent Covert Arms Transfers to Iran (December 17, 1986), a copy of which has been previously provided to the Senate Intelligence Committee. See also GAO Report to the Chairmen of the Senate and House Select Committees Investigating the Iran Arms Sales: DOD's Transfer of Arms to the Central Intelligence Agency at 8 (March 1987). In the absence of this authority, the President would not have been able to accomplish the covert transfers of arms to Iran, because such transfers would not have been permitted under the Arms Export Control Act.

2. Q: Is United States v. Nixon relevant to the issue of the constitutionality of the 48-hour notification requirement?

A: In United States v. Nixon, 418 U.S. 683 (1974), the United States District Court for the District of Columbia, on behalf of the Watergate grand jury, had issued a subpoena *duces tecum* directing the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. President Nixon filed a motion to quash the subpoena on the ground that the tape recordings and documents were absolutely privileged. The claim of absolute privilege was based on the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their duties. Although the Supreme Court rejected President Nixon's claim of absolute privilege, it held that the subpoenaed materials were "presumptively" privileged. The fact that the privilege was "presumptive" required the Court to balance the "importance of . . . confidentiality of Presidential communications . . . against the inroads of such a privilege on the fair administration of criminal justice." The Court concluded that, in the circumstances of that case, the latter interest was weightier, and therefore held that the tape recordings and documents in question were not protected by executive privilege.

The Court in Nixon discussed national security secrets in two portions of its opinion. First, in holding that executive privilege based "solely on the broad, undifferentiated claim of public interest in the confidentiality of [Executive branch] conversations" is not absolute, the Court was careful to note that President Nixon was not making a "claim of need to protect military, diplomatic, or sensitive national security secrets." 418 U.S. at 706. The Court's reasoning therefore makes clear that a claim based on such a need may be evaluated as a matter of executive privilege.

The next section of the Court's opinion balanced the importance of confidential communications, which are presumptively privileged, against the need for information in a criminal proceeding. Again, in holding that the generalized need for confidentiality was outweighed by need for the materials in a criminal proceeding, the Court referred to the President's national security responsibilities:

> [President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.

418 U.S. at 710 (emphasis added), citing C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Reynolds, 345 U.S. 1, 10 (1953). This reasoning certainly indicates that the Court may have reached a different result had national security secrets been involved.

As the preceding discussion makes clear, you correctly pointed out that the holding in United States v. Nixon was concerned with a claim that documents were privileged because they contained confidential communications between the President and his advisors. While Presidential findings required by S. 1721 ordinarily would not contain such confidential communications, we nevertheless believe that there is a great deal of analysis in United States v. Nixon that relates to the subject matter of "military, diplomatic, or sensitive national security secrets." 418 U.S. at 706. The Nixon Court's discussion of this type of information may be technically described as dicta, but it is nevertheless extremely important because few decisions, let alone Supreme Court decisions, address this subject. In our view, the dicta in Nixon suggest: (1) the President has a particular responsibility with respect to foreign policy and the maintenance of military, diplomatic, and national security secrets, and (2) claims of privilege related to this authority are inherently stronger than claims seeking to protect his confidential communications with his advisors.

Thus, United States v. Nixon is indeed relevant to the constitutionality of the 48-hour notice provision of S. 1721. Nixon implies that in protecting the confidentiality of national security information, the President is constitutionally entitled, if not to an absolute privilege, at least to "utmost deference" from the other branches of government. A 48-hour notice requirement for covert operations, legislated in advance and rigidly applicable without regard to exigencies of individual cases, simply cannot be reconciled with the President's responsibility for protecting confidential information in the area of foreign affairs and national security. While the President may be required to notify Congress, he constitutionally may not be required to do so within some arbitrary, fixed period of time.

3. Q: President Washington, in refusing to turn documents relating to the Jay Treaty over to the House of Representatives, mentioned that the Senate was made a part of the treaty-making process because of its ability to keep secrets. If a body composed of twenty-six members (the size of the Senate at the time of the ratification of the Jay Treaty) can keep secrets relating to foreign affairs, cannot the "gang of eight" be entrusted with such secrets?

A: In 1796, President Washington refused to give to the House of Representatives the instructions, correspondence, and documents relating to the negotiation of the Jay Treaty. He pointed out that "all the Papers affecting the negotiations with Great Britain were laid before the Senate when the Treaty itself was communicated for their consideration and advice." *Refusal by President George Washington to Submit Confidential Correspondence With John Jay to the House of Representatives*, March 30, 1796, *reprinted in* 1 W. Goldsmith, *The Growth of Presidential Power* 419 (1974). He nevertheless argued that the documents in question were not "relative to any purpose under the cognizance of the House of Representatives, except that of impeachment, which the [House] resolution has not expressed." Therefore, he refused to give to the House of Representatives documents that he already had given to the Senate.

President Washington's actions were not based on an *ad hoc* determination that the Senate was better able than the House of Representatives to keep a secret. They were based instead on the fact that the Constitution assigned to the Senate a role in the treaty-making process, but did not assign similar role to the House of Representatives. There were a number of reasons why the Framers decided to exclude the House, but not the Senate, from the treaty-making process. Alexander Hamilton argued that the large size of the body and its fluctuating membership meant that it would not have: (1) an "[a]ccurate and comprehensive knowledge of foreign politics"; (2) a "steady and systematic adherence to the same views"; and (3) the ability to act in a timely manner in giving its advice and consent.' *The Federalist No. 75*. Moreover, President Washington suggested that the participation of the Senate rather than the House represented a victory at the Constitutional Convention by the smaller states, which are granted equal representation in the Senate. See *Refusal by President George Washington to Submit Confidential Correspondence With John Jay to the House of Representatives*, March 30, 1796, *reprinted in* 1 W. Goldsmith, *The Growth of Presidential Power* 419-420 (1974). Finally, both Hamilton and Washington recognized that one reason for giving the Senate, rather than the House, a role in the treaty-making process is that the smaller number of Senators would mean that that body would be better able to maintain secrecy. See The Federalist No. 75 (Hamilton) ("secrecy . . . [is] incompatible with the genius of a body so variable and so numerous"); Refusal by President George Washington to Submit Confidential Correspondence With John Jay to the House of Representatives, March 30, 1796, reprinted in 1 W. Goldsmith, The Growth of Presidential Power 419 (1974)("[t]he necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members").

President Washington's remark about secrecy, which was quoted in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 321 (1937), does not mean that the structure of our constitutional system suggests that any body of fewer than twenty-six members can be trusted with all secrets in the area of foreign affairs. The Framers, in fact, recognized that even the Senate could not be trusted with all secrets relating to treaties. John Jay, for example, stated:

> It seldom happens in the negotiation of treaties of whatever nature, but that perfect secrecy and dispatch are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives, and there doubtedless are many of both descriptions, who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly. The convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.

The Federalist No. 64 (Jay)(emphasis in original).

The Senate was made a part of the treaty-making process not because it could be trusted with all secrets. Instead, it was made a part of the process because the Framers believed it would be "utterly unsafe" to entrust "the entire power of making treaties" to "an elective magistrate of four years durations." The Federalist No. 75 (Hamilton). According to Hamilton, a President might be avaricous or ambitious and therefore "sacrifice his duty to his interest" in dealing with foreign nations. Id. In short, the Senate was made a part of the treaty-making process so that there would be a check on the President's ability to enter into commitments that would be legally binding on the nation, even though it was recognized that the Senate would not be able to keep secrets as well as the President. That the Senate's smaller size made it marginally superior at keeping secrets to the House of Representatives was one of the reasons for excluding the latter body from the process. But it does not comport with the historical record to suggest that the Senate was made a part of the treaty-process because bodies with twenty-six members have the same ability to keep secrets as the Chief Executive.

Obviously, entrusting a secret to eight individuals entails less risk of an unauthorized disclosure than does entrusting it to a larger number, as the existing statute and S. 1721 implicitly acknowledge by providing for limited notification of the so-called "gang of eight" in certain circumstances. It follows that entrusting a secret to fewer than eight individuals, or to no one, entails still less risk of an unauthorized disclosure, and this is true no matter how low or speculative is the risk of a disclosure from one of the eight individuals. It does not follow, therefore, that there can be no constitutional infirmity in a provision that requires the President to notify eight Members of Congress of all covert actions within forty-eight hours.

4. Q: Does Article I, section 8, clause 14 of the Constitution provide authority for Congress to impose on the President a 48-hour notice requirement for covert operations?

A: Article I, section 8, clause 14 of the Constitution provides that Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." This power is "separate from the appropriation power [and] the power to raise and support armies." The suggestion that the CIA is like the army or the navy when it engages in covert actions, and that Congress pursuant to its authority under this section therefore should be able to make rules governing covert operations would appear to be premised on the notion that covert actions are analogous to military operations. Even if one assumes arguendo that some covert actions conducted by the CIA are sufficiently analogous to military actions to come within Article I, section 8, clause 14, however, it does not follow that Congress has authority to impose a requirement that the President notify Congress within forty-eight hours of such operations. The clause in question was borrowed from a corresponding provision in the Articles of Confederation that empowered the United States Congress to make "rules for the government and regulation of the . . . [national] land and naval forces, and [to] direct[] their operations." As you can see, the Framers of the Constitution eliminated that part of the clause in the Articles that authorized Congress to direct the operations of the land and naval forces. This deletion was necessary, of course, because the

Constitution makes the President the Commander-in-Chief of the armed forces and that power authorized him to direct the operations of the land and naval forces.

Justice Story shed some light on the intent of the Framers in granting Congress the authority to make "Rules for the Government and Regulation of the land and naval Forces." In his Commentaries on this constitutional provision, he stated that the power of "regulating fleets and armies . . . is far more safe in the hands of congress than of the executive." 3 Story, Commentaries on the Constitution § 1192. Otherwise, Justice Story asserted, "the most summary and severe punishments might be inflicted at the mere will of the executive." Id. Article I, sec. 8, cl. 14, then, was apparently intended simply to grant Congress the authority to establish rules of conduct for the military establishment and a system of justice for enforcing these rules. The Framers believed that the President, who was to have tactical control over the armed forces by virtue of his authority as Commander-in-Chief, should not also have the power to make and enforce the rules governing the conduct of those individuals serving in the military. Justice Story's analysis, of course, is consistent with the Framers' decision to incorporate into the Constitution the provision of the Articles authorizing Congress to make rules for the government and regulation of the armed forces while at the same time deleting that portion of the provision authorizing Congress to direct the operations of the armed forces.

The relevant judicial decisions construe Article I, sec. 8, cl. 14 in the same manner as did Justice Story. Just last Term, the Supreme Court held in Solorio v. United States, 107 S.Ct. 2924 (1987), that the jurisdiction of a court-martial over an offense depends upon only one factor, the military status of the accused.[1] The Court noted that pursuant to its power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Congress had empowered the courts-martial to try servicemen for all of the crimes proscribed by the Uniform Code of Military Justice, regardless of whether they were "service related." Id. at 2926. Chief Justice Rehnquist's opinion for the Court went on to state that the power to make rules for the regulation and government of the armed forces "embraces the authority to regulate the conduct of persons who are actually members of the armed services." Id. at 2928.

Probably the best judicial exposition of Article I, section 8, clause 14 is contained in Chappel v. Wallace, 462 U.S. 296 (1983). There, the Court stated that many of the Framers "had recently experienced the rigors of military life and were well aware of the differences between it and civilian life." Id. at

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[1] This decision overruled O'Callahan v. Parker, 395 U.S. 258 (1969), which held that the jurisdiction of a court martial to try a member of the armed forces depends upon the "service con-

300. Article I, section 8, clause 14 was "their response" to the recognized need to establish "rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." Id. at 301.[2] Admittedly, the Court did not engage in a protracted analysis of the contours of Article I, section 8, clause 14. That is because "[t]he need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion." Id. at 300.

All of the other judicial opinions construing Article I, section 8, clause 14 similarly suggest that the clause was intended to grant Congress the authority to establish the "rights, duties, and responsibilities in the framework of the Military Establishment." Id. at 301. See, e.g., United States v. Stanley, 107 S.Ct. 3054 (1983). This is inevitable, given that the Framers decided to vest the President with authority as Commander-in-Chief while simultaneously removing Congress' power to direct the operations of the armed forces. As Commander-in-Chief, the President is to have "supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy." The Federalist No. 69, 418 (Hamilton). This means that although Congress has the power to raise and fund armies and navies, the President has complete tactical command of the forces that Congress chooses to provide. If clause 14 were interpreted as authorizing Congress to control actual military operations, as opposed to prescribing a code of conduct governing military life, the President's authority as Commander-in-Chief would be rendered meaningless.

Article I, section 8, clause 14, then, does not empower Congress to require the President to give it notice of all covert actions within 48 hours. To the best of my knowledge, Congress has never attempted to rely upon its authority under clause 14 to do anything other than regulate the conduct of those in the military establishment. Moreover, while Article I, section 8, clause 14 may empower Congress to establish a code of conduct for the individuals engaged in such covert actions, it does not provide authority for Congress to intrude in any way upon the Commander-in-Chief's decisionmaking authority.[3] To the extent a

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[1] (Cont.) nection" of the offense charged.

[2] The Supreme Court stated that Article I, section 8, clauses 12 and 13 were also part of this "response." Chappell v. Wallace, 462 U.S. 296, 301 (1983).

[3] The underlying premise of your question, that some covert actions are analogous to military operations, means that any congressional regulation of such actions implicates the President's Commander-in-Chief authority. Many covert actions, of course, are not at all like military actions and I do not mean

covert action is analogous to a military action, which is the premise of your question, the President as Commander-in-Chief retains complete control over the operation. Obviously, a critical aspect of control over a covert operation is the authority to decide when and to whom to disclose the operation.

5. Q: Does Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), support congressional authority to impose a 48-hour notification requirement?

A: You stated that Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), involved the President's "authority to direct the Navy when there have been Congressional limitations." I do not read Barreme as a decision under Congress' power to make rules for the government and regulation of the land and naval forces, but rather as one under Congress' power to regulate foreign commerce.

In 1799, Congress passed the Non-Intercourse Act, prohibiting any "ship or vessel owned, hired or employed, wholly or in part, by any person resident within the United States" to depart from the United States and proceed directly or indirectly to any territory controlled by France. Section 5 of the Act, most relevant for our purposes, authorized "the President of the United States, to give instructions to the commanders of the public armed ships of the United States, to stop or examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the [Act]." Although the Act prohibited only sailing to French ports, the secretary of the Navy conveyed to the commanders President Washington's instruction "to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to, or from, French ports do not escape you."

The Flying Fish was a Danish vessel carrying Danish and neutral cargo from a French port. Captain Little, the commander of the United States frigate Boston, captured the Flying Fish upon suspicion that the vessel had been owned, hired, or employed wholly or in part by an American. The district court ordered return of the ship and its cargo because there was insufficient proof that the ship was really American, but refused to award damages for its capture and detention because there had been probable cause to suspect that the ship was American. The circuit court reversed the district court's failure to award damages on the ground that the Flying Fish was not subject to capture under the Non-Intercourse Act even if it had been American because it had been sailing from, not to, a French port.

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[3] (Cont.) to imply that the President could initiate them pursuant to his authority as Commander-in-Chief.

The Supreme Court affirmed the award of damages, noting that Congress had only prohibited American vessels sailing to French ports, and that therefore the Act "exclude[d] a seizure of any vessel not bound to a French port." In my opinion, the Court's decision appears to rest on Congress' power to regulate commerce with foreign nations. As the Court noted, the Act authorized the President only to enforce a prohibition on American ships sailing to French ports, and by implication, excluded the capture of ships sailing from French ports. See 6 U.S. (2 Cranch) at 177-78. Thus, because the President exceeded his mandate under the Act by ordering the capture of American ships sailing from, as well as to, French ports, that order could not excuse Captain Little's liability for damages to the Flying Fish.

At most, Barreme establishes congressional authority to prohibit the President from taking certain actions abroad when Congress is acting pursuant to one of its enumerated powers. The constitutional objections to notification requirements of the kind proposed in S. 1721 stem from their interference with the President's ability to fulfill his constitutional responsibilities. Specifically, Congress may not interfere with covert activities undertaken pursuant to an inherent power of the President, such as his constitutional power to protect the lives of United States citizens abroad. See Durand v. Hollins, 8 Fed. Cases 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186). Moreover, the broad, 48-hour notification requirements of S. 1721 may, in certain instances, be subject to a valid claim of executive privilege in order to preserve the national security interest of the United States. United States v. Nixon, 418 U.S. 683 (1974).[4]

6. Q: What authorities support the statements in your testimony that Article II, section 1 of the Constitution confers on the President "plenary authority to represent the United States and to pursue its interests outside the borders of the country," and that "since the beginning of the Republic it has been recognized by the President, Congress, and the Judiciary that the Constitution vests in the President broad and exclusive responsibilities in the field of foreign relations"?

A: In my written testimony, I stated that Article II, Section 1 of the Constitution, which provides that "the Executive power shall be vested in a President of the United States of America," had "long been understood to confer on the President a plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject of course to the limits set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers." I further stated that "since the beginning of the Republic it has been recognized by the President, Congress, and the Judiciary that the Constitution vests in the President broad and exclusive responsibilities in the field of foreign relations." These statements do not suggest that the entire field of foreign relations is an exclusive presidential domain, but that within the totality of the nation's foreign relations power, the President enjoys a realm of authority that is not subject to congressional veto. These statements are not controversial and are amply supported by constitutional text, judicial precedent, and historical experience.

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[4] You also inquired about the source of Congress' authority to enact the National Security Act. I believe that Congress had the authority to enact this legislation under the Necessary and Proper Clause, Art. I, section 8, clause 18. This authority permits Congress to enact laws necessary and proper for carrying into execution powers vested in the President. The National Security Act establishes governmental entities, such as the Central Intelligence Agency and the National Security Council, through which the President may fulfill his responsibilities in

One of the clearest examples of the President's exclusive authority in the area of foreign relations is indeed the most basic aspect of that subject: the decision whether to have relations with a foreign state at all. Article II, Section 3 of the Constitution grants to the President the exclusive power to "receive ambassadors and other public ministers." As Professor Louis Henkin of Columbia University has pointed out, pursuant to this power "the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize foreign governments and whether to maintain or terminate relations with them." L. Henkin, Foreign Affairs and the Constitution 47 (1972). From the time of President Washington's dismissal of Citizen Genet, this power has also included the right of the President to expel foreign diplomats, even when the consequences of such expulsion are "a breach of diplomatic relations leading eventually to hostilities." E. Corwin, The Constitution and What It Means Today 190 (H. Chase and C. Ducat, eds., 1978). This power has been recognized by the courts. As Justice Brennan put it, "Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting). See also United States v. Pink, 315 U.S. 203, 229-230 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

An important adjunct to the President's exclusive power to institute or terminate diplomatic relations is his exclusive power to conduct those relations. Jefferson noted that "The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." Opinion on the Powers of the Senate Respecting Diplomatic Appointments,

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[4] (Cont.) foreign affairs.

April 24, 1790, printed in 16 Papers of Thomas Jefferson 378, 379 (Boyd, ed., 1961). Jefferson made this point with even greater specificity in rebuking Citizen Genet for attempting to present a consul whose commission was addressed to the Congress of the United States. Jefferson emphatically declared that as the President is "the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right and are bound to consider as the expression of the nation . . . ." Jefferson to Edmond C. Genet, November 22, 1793, in 9 The Writings on Thomas Jefferson 256 (Bergh, ed., 1903).

The same point was made by John Marshall when he referred to the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800). Marshall made this statement, later cited with approval in Justice Sutherland's opinion in United States v. Curtiss-Wright Export Corp., not in his judicial capacity but rather as a member of the House of Representatives. Indeed, the Congress recognized the importance of protecting what Professor Henkin has termed "the President's monopoly on communications," L. Henkin, op. cit., at 301, by passing the Act of January 30, 1799, 1 Stat. 613 (1799) (codified as amended at 18 U.S.C. § 953 (1982)), formally entitled "An Act to Prevent Usurpation of Executive Functions," but more colloquially known as the Logan Act. This act made it a crime for any citizen [illegible] the United States, without the permission or authority of the government, to commence or carry on any correspondence or intercourse with any foreign government with an intent to influence the measures or conduct of that government in relation to any disputes or controversies with the United States. The sponsor of the legislation, Representative Roger Griswold of Connecticut, explained that the purpose of the bill was to "punish a crime which goes to the destruction of the Executive power of the Government . . . [,] that description of crime which arises from an interference of individual citizens in the negotiation of our Executive with foreign Governments." 9 Annals of Cong. 2488-2489 (1798). Representative Griswold noted that "[t]his power has been delegated by the Constitution to the President; and . . . the people of this country might as well meet and legislate for us, or erect themselves into a judicial tribunal, in place of the established Judiciary, as that any individual, or set of persons, should take upon him or themselves this power, vested in the Executive. . . . [S]uch practices would be destructive to the principles of our government." Id. at 2494. Other congressmen also recognized that communications with foreign governments was an exclusive presidential prerogative. Representative James Bayard of Delaware noted that "the object of the law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only." Id. at 2588 (1799); see id. at 2677 (remarks of Rep. Parker).

The exclusive power of the President in the conduct of diplomacy has been recognized by the courts as well. In Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), rev'd on other grounds, 444 U.S. 996 (1979), the Court of Appeals for the District of Columbia Circuit stated: "The subtleties involved in maintaining amorphous relationships are often the very stuff of diplomacy -- a field in which the President, not Congress, has responsibility under our Constitution." 617 F.2d at 708. The most well-known judicial exposition of this presidential authority is, of course, the case of United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). There Justice Sutherland referred to the "delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations . . . ." 299 U.S. at 320. And as the Court of Appeals for the District of Columbia Circuit has recognized, the President's status as the nation's sole organ in the field of international relations, "is not confined to the service of the President as a channel of communication . . . but embraces an active policy determination as to the conduct of the United States . . . ." Goldwater v. Carter, supra, 617 F.2d at 707.

A third power of the President in the field of foreign affairs, one that flows logically from his role as the sole organ of diplomacy, is the President's power to enter into executive agreements. The Constitution, of course, sets forth one mechanism whereby the United States may enter into agreements with foreign nations: a treaty negotiated by the President and then approved by a two-thirds vote of the Senate. Throughout our history, Presidents have also invoked inherent powers to conclude international agreements without Senate approval. For example, the following measures were all concluded by executive agreement: the 1817 agreement between British Foreign Minister Bagot and American Secretary of State Rush for the limitation of naval forces on the Great Lakes; the 1898 protocol between the United States and Spain under which Spain ceded Cuba, Puerto Rico, and other West Indian possessions to the United States; the 1899 and 1900 agreements with the European powers establishing the "open door policy" in China; the so-called "gentlemen's agreement" limiting Japanese immigration to the United States; the November 11, 1918, armistice ending the First World War; and, most notably, President Roosevelt's swap of American destroyers for military leases on British territory.

Under his power to conclude executive agreements, the President may settle the claims of American nationals against foreign states. Dames & Moore v. Regan, 453 U.S. 654, 679-680 (1981). As Justice Rehnquist noted in Dames & Moore: "At least since the case of the 'Wilmington Packet' in 1799, Presidents have exercised the power to settle claims of United States nationals by executive agreement." Id. at 679 n.8. Moreover, these agreements are fully enforceable as part of the "law of the land," despite the fact that Congress has no part in their making. United States v. Pink, 315 U.S. 203, 228-230 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

A fourth power of the President with obvious ramifications for the conduct of foreign relations is his power as Commander-in-Chief of the Army and Navy. This power clearly gives the President tactical control of the armed forces. And, although the boundary between the President's power as Commander-in-Chief and Congress' power to declare war is ill-defined, the President's authority to engage in certain types of military action without congressional approval is well settled. This is especially true of military actions designed to protect the lives or property of Americans residing abroad. As early as 1860 a federal court recognized this principle in deciding a suit brought against the commander of an American gun ship that had bombarded a town in Nicaragua where a revolutionary government had engaged in violence against American citizens and their property. In dismissing the civil action for damages resulting from the bombardment, Justice Nelson of the Supreme Court noted: "As the Executive head of the nation, the President is made the only legitimate organ of the government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of persons and property and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands under the Constitution . . . ." Durand v. Hollins, 8 Fed. Cases 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186).

These examples do not fully exhaust the list of exclusive presidential powers in the field of foreign affairs. Similarly, even as to the exclusive powers discussed, we have not attempted to adduce every citation of authority for the propositions advanced. Nevertheless, this discussion clearly substantiates my claim that all three branches have recognized that the Constitution vests in the President certain exclusive responsibilities in the field of foreign relations.

7. Q: How do the decisions in Japan Whaling Association v. American Cetacean Society, 106 S. Ct. 2860 (1986); United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977); United States v. A.T.&T., 551 F.2d 384 (D.C. Cir. 1976); and Dames & Moore v. Regan, 453 U.S. 654 (1981), affect the analysis set forth in your answer to the preceding question?

A: Nothing in the cases that you asked me to consider in this regard, Japan Whaling Association v. American Cetacean Society, 106 S. Ct. 2860 (1986); United States v. A.T.&T., 567 F.2d 121 (D.C. Cir. 1977); United States v. A.T.&T., 551 F.2d 384 (D.C. Cir. 1976); and Dames & Moore v. Regan, 453 U.S. 654 (1981), suggests that my analysis is mistaken.

The Japan Whaling case in no way refutes the proposition set forth in my testimony that the President enjoys broad and exclusive powers in the field of foreign affairs. The issue in that case was whether the Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978, required the Secretary of Commerce to certify to the President that Japanese nationals were conducting fishing operations in a manner that diminished the effectiveness of an international fishery conservation program. The International Whaling Commission (IWC) had proposed a moratorium on commercial whaling. Because the Commission's moratorium was not legally binding on Japan, the United States sought other means to induce Japan to limit its whaling activities. Accordingly, in 1984 Japan and the United States concluded an executive agreement under which Japan would adhere to certain harvest limitations during the proposed moratorium and would cease commercial whaling by 1988. In light of these promises, the Secretary of Commerce determined that the short term continuation of limited whaling by Japan, coupled with its promise to discontinue all commercial whaling by 1988, would not diminish the effectiveness of the International Convention for the Regulation of Whaling, thereby requiring certification to the President under the Pelly Amendment. Japan would thus avoid the mandatory imposition of trade sanctions required by the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821(e)(2).

This agreement was challenged by several wildlife conservation groups who filed suit seeking a writ of mandamus compelling the Secretary of Commerce to certify Japan under the Pelly Amendment. The executive branch did not deny the constitutional power of Congress to enact mandatory sanctions for whaling in excess of IWC quotas. Even though such legislation would clearly affect international relations, the Constitution's plenary grant of the power to regulate foreign commerce would unquestionably authorize that action. Rather, the primary issue in the case was a question of statutory interpretation, whether the Secretary of Commerce was required to certify Japan simply because it engaged in whaling beyond that permitted by IWC quotas, or, whether, in view of all the circumstances, the Secretary was permitted to exercise discretion in determining whether Japan's whaling practices diminished the effectiveness of an international fishery conservation program. A secondary, although threshold, issue was whether the case presented a political question that the judiciary was not competent to decide. The Court rejected application of the political question doctrine, because the issue presented to it was "a purely legal question of statutory interpretation." 106 S. Ct. at 2866. The Court recognized the foreign policy implications inherent in the case and further recognized "the premier role which both Congress and the Executive play in this field." Id. Nevertheless, the Court held that the case presented a justiciable controversy and proceeded to resolve the merits.

The Court's passing reference to "the premier role which both Congress and the Executive play in this field" is a judicial recognition of the shared nature of the foreign relations power. The reference does not support, however, the proposition that

Congress has the preeminent role in that field. Japan Whaling does not present any issue of congressional versus presidential power in the field of foreign relations, and the Court offers no discussion of that issue, much less a resolution that would award Congress the preeminent place.

Similarly, the two decisions by the Court of Appeals for the District of Columbia Circuit in United States v. A.T.&T. are not inconsistent with the analysis set forth in my prepared testimony. The cases arose from a subpoena issued by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce. The subcommittee was interested in determining the nature and extent of warrantless wiretapping in the United States for asserted national security purposes. Specifically, the subcommittee was concerned that national security was being invoked to justify otherwise illegitimate invasions of American citizens' privacy. The wiretaps at issue had been carried through facilities provided by A.T.&T. upon its receipt from the FBI of "request" letters. Each request letter specified a target line to be tapped, and requested a "leased line" to carry the tapped communications from the target location to a designated monitoring station manned by federal agents. The subcommittee issued a subpoena to the President of A.T.&T. requiring him to produce copies of all national security request letters sent to A.T.&T. and its subsidiaries by the FBI, as well as records of such taps prior to the time when the "request" letter procedure was initiated.

Although A.T.&T. was willing to comply with the subpoena, the executive branch did not want this material to be released. Accordingly, the subcommittee was approached in an attempt to work out some compromise solution. These negotiations eventually failed, however, and President Ford instructed A.T.&T., "as an agent of the United States, to respectfully decline to comply with the Committee's subpoena." When the company appeared likely to disregard the President's instructions and to comply with the subpoena, the Department of Justice obtained a TRO prohibiting A.T.&T. from complying with the subpoena. After a hearing, the district court issued judgment in favor of the executive branch and entered a permanent injunction prohibiting A.T.&T. from complying with the subpoena.

On its initial review, the court of appeals recognized that the case presented "patently conflicting assertions of absolute authority. Each branch of government claims that as long as it is exercising its authority for a legitimate purpose, its actions are unreviewable by the courts." 551 F.2d at 391. The court noted the tradition of judicial deference to executive actions in the area of foreign affairs exemplified by United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), and C. & S. Airlines v. Waterman Steamship Co., 333 U.S. 103 (1948), while at the same time conceding that "congressional power to investigate and acquire information by subpoena is on a firm constitutional basis . . . ." Id. at 392, 393. The court was unwilling, however, to resolve this clash of absolutes and therefore remanded the case to the District Court "for further efforts at a settlement." Id. at 394.

The court's hope that a compromise could be achieved by the parties was not fulfilled. Six months after the original decision, the case returned to the court of appeals with the parties still unable to bridge their differences. Even on this second hearing, however, the court of appeals refused to decide the clash of absolutes. Instead, the court fashioned a compromise of its own, under which the subcommittee would receive most of its material in an expurgated form. 567 F.2d at 131-133. The court also provided procedures for in camera review to verify the appropriateness of the deletions made by the executive branch on national security grounds.

It is important to note that the A.T.&T. cases did not involve a clash between presidential and congressional power in the field of foreign affairs. Rather, the issue in those cases was presidential power in the field of foreign affairs versus congressional power in the domestic sphere. Congress was seeking to investigate alleged invasions of the privacy of American citizens who were not engaged in activities implicating national security. It was not claiming power to control the executive with regard to wiretaps against persons who were engaged in such activities, or with regard to wiretaps abroad of agents of foreign powers. The cases, therefore, do not squarely present the issue raised by S. 1721; namely, the respective authority of the President and the Congress over a subject exclusively within the field of foreign affairs.

It is, of course, true that several paragraphs of the court's second decision endorsed the proposition that both the President and Congress exercise powers that implicate foreign affairs and national security. 567 F.2d at 128. We have no quarrel with that proposition. No one could deny that the Constitution specifically grants Congress the power to declare war, to raise and support armies, to regulate foreign commerce, to establish a uniform rule of naturalization, and other powers that involve our relations with other countries. Nothing in my testimony is inconsistent with that commonplace and uncontroversial notion. My point is equally commonplace and uncontroversial -- that the President also has foreign affairs powers, powers that are exclusively his.

The proposition that there is a reservoir of exclusive presidential authority in the field of foreign affairs is supported by the Supreme Court's decision in Dames & Moore v. Regan, 453 U.S. 654 (1981). That case, which affirmed the President's right to nullify attachments and other restraints on Iranian assets and to suspend claims of American nationals against Iran by executive order, invoked the three-part analysis of Justice Jackson's concurring opinion in the Steel Seizure Case. 453 U.S. at 668-669, 674. There Justice Jackson argued that "When the

President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate," that when he "acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain," and finally that "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635-637 (1952) (Jackson, J., concurring). But to say that the President can do the least when he acts purely on his own authority and in the face of congressional opposition is not to say that he can do nothing in those circumstances. Indeed, Justice Jackson's three-part analysis implicitly recognizes that there is a third category, however defined, in which the President may in fact take action directly contrary to congressional enactments. Nothing in *Dames & Moore v. Regan* purports to define the boundaries of presidential power in the third category. The case does recognize, however, by necessary implication, that such a category exists. *Dames & Moore* is therefore entirely consistent with our view that there are areas of foreign affairs and national security committed to the President's exclusive and irreducible authority.

Sincerely,

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel

cc: Senator David Boren
Senator William Cohen

OVERSIGHT LEGISLATION HEARING

WEDNESDAY, DECEMBER 16, 1987

U.S. SENATE,
SELECT COMMITTEE ON INTELLIGENCE,
Washington, DC.

The Select Committee met, pursuant to notice, at 9:40 o'clock a.m., in Room SD-562, Dirksen Senate Office Building, the Honorable David Boren (chairman of the committee) presiding.

Present: Senators Boren, Bentsen, Cohen, Hatch, Murkowski, Specter, Hecht, and Warner.

Staff present: Sven Holmes, staff director and general counsel; James Dykstra, minority staff director; and Kathleen McGhee, chief clerk.

Chairman BOREN. The meeting will come to order at this point. Mr. Secretary, we're certainly glad to have you and our other distinguished witnesses with us this morning. I apologize for the delay in getting started. I think a number of us have several things going at once this morning. I'm trying to vote in two different conference committees that are both meeting at the same hour as this particular meeting. This hearing, of course, is a continuation of our hearings on proposed legislative language that would change the current law in regard to legislative oversight of intelligence operations and procedures. A very important matter, indeed. We've already had an exhaustive study of this matter in the committee. We have had days of public hearings as well as closed hearings at which we have heard from Judge Webster among others on sensitive matters that might touch upon classified national security information. We welcome you to the committee today and are anxious to have your input. The committee seriously wants to write good legislation that provides the appropriate balance between oversight and accountability under our democratic process, while at the same time protects those matters which, of necessity, must remain secret. It must protect the sources and methods which must be used if we are to have an effective national intelligence operation. So we welcome you this morning. We're glad you are here and we value your insights. Let me ask, before we turn to you for your opening statement, the other members of the committee if they might have some opening comments. I'll begin with the vice chairman.

Senator COHEN. Thank you, Mr. Chairman. Secretary Carlucci, welcome. I should point out for the benefit of those in the audience and those who may be watching that you are in the process of recovering from a touch of the flu. We'll try and take that into account. That flu bug has touched many of us in the Senate as well. We appreciate your coming up on such short notice. Your time is limited and I doubt whether you will have an opportunity to hear some of the testimony from the witnesses that will follow you. Occasionally, we have statements that are presented which, in my mind at least, stand out like shining stars in a galaxy. And one such statement is that of Clark Clifford who is sitting in the front row and who will be testifying later. Mr. Clifford, I hope you'll accept my apologies for stealing a few of your lines in advance. But your statement struck me late last evening as I was reading it as so pertinent and so well phrased that I thought I might at least quote two or three paragraphs in addressing the issue. One thing that we have heard over and over during the course of the Iran-Contra hearings and indeed during hearings on this bill, is that the President is the sole spokesman on behalf of the country in terms of our foreign policy. And we don't disagree with that. The President may be the sole spokesman of our foreign policy, but he is not the sole architect. And that's the point that we are trying to make. He is not the sole architect of our foreign policy. In Mr. Clifford's statement, he said, "In my judgment, the Constitution clearly provides to congress an important role in foreign policy. And this role includes the process of overseeing covert activities. It is part of the system of checks and balances among the separate branches of government and we should remember that the oversight process does not give the congress a veto, only a voice." Another paragraph struck me last evening. "The oversight process could have served a significant salutory purpose"—in talking about Iran—"giving the President the benefit of the wisdom of those who are not beholden to him but beholden like him directly to the people and prepared to speak frankly to him based on their wide and varied experience." And finally, on page 10 of his statement, "The purpose of this legislation is not to assume good faith, but to ensure good government."

I think that really sums up the essence of the legislative bills proposals, before us, or to ensure good government not assume good faith. And Mr. Clifford, I appreciate your statement. We'll talk about it at length when you testify. But I thought Secretary Carlucci should have the benefit of at least those words coming from witnesses who will follow you.

Chairman BOREN. Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman. I have a statement which I will enter into the record as read. However, I do want to welcome Mr. Carlucci this morning. I would echo the remarks of my colleague from Maine as far as the frustration of this Senator in the oversight responsibility which I feel belongs with a position on the Intelligence Committee, yet knowing that the Administration must have flexibility, the President must have flexibility. The question is what's reasonable. And I have already experienced one instance that I consider unreasonable as a Member of this Committee. So I look forward to the this morning's testimony which I hope will help identify the ground where we can meet our responsibility—our oversight responsibility—and still protect the strategic interests of our country.

That you, Mr. Chairman.

Chairman BOREN. Thank you, Senator Murkowski. We'll enter your full statement into the record.

[The statement of Senator Murkowski follows:]

Prepared Statement of Hon. Frank Murkowski, a U.S. Senator From the State of Alaska

Mr. Chairman, this is the third in a series of public hearings on intelligence oversight legislation. I believe these hearings have served a valuable purpose in clarifying the choices as we try to strike the best possible balance between the people's right to know and the Intelligence Community's need for operational security.

We have before us a very distinguished list of present and former officials who, together, embody the collective wisdom of four decades of making national security and intelligence policy. All of us have the same objective--to make Congressional oversight of intelligence an effective, efficient instrument of our national interest.

I believe we are very close to having a bill that we can report out of this Committee and support on the Floor. With the help of the witnesses before us, I hope we can complete the task today.

Chairman **Boren**. Senator Hecht, any opening comments this morning?

Senator **Hecht**. Thank you, Mr. Chairman. Publicly in this room when we met last time I stated that I was against all the legislation that has been introduced. I have not changed my mind. I do not see the need for the steamroller effect. You have mentioned that we have had exhaustive hearings. We have had a lot of hearings. To say they have been exhaustive, no, I don't think they have been.

What we are doing is a further continuation of the Iran-Contra hearings. We are hurting our intelligence worldwide. You know, worldwide intelligence is worldwide cooperation. And who's going to trust us when we have all these cameras in front of us. Other countries not knowing what's going to come out. People who have risked their lives to work with us, help us, heads of state, hostile countries. And I don't think we are acting in a manner which the United States Senate should do. I think these hearings, I think we've got to take a lot of time on this. I think we've got to take a lot of time in our secret room in H-219. And I would certainly say hold up, we're going too fast, because let's not destroy our intelligence operations around the world.

Thank you.

Chairman **Boren**. Thank you, Senator Hecht. We're going to continue you in the undecided column on this matter that is pending.

Senator Specter? Any opening comments that you would like to make?

Senator **Specter**. Well, I join my colleagues in welcoming you here, Mr. Carlucci. Great pleasure to see you on the job. I regret my late arrival, but I've been attending the hearings for Judge Kennedy on confirmation. I'll be moving back and forth between the 2 committee hearing rooms.

I have heard what my colleague Senator Hecht has said in the earlier hearings which we have held. I have expressed my own view on the importance to have congressional involvement and congressional oversight and it seems to me that that is not possible if we are to accept the President's letter to this committee saying that he will give us notice within 48-hours absent extraordinary circumstances. Because if we sit back and accept that, then the position on congressional oversight is weakened substantially from what it was on the Iran-Contra matter where the statute required timely notice and we found that some 14 months had elapsed before the Congress found out about the sale of arms to Iran and then only because of disclosures through collateral sources.

So it seems to me that if there is to be any meaningful congressional oversight, there's going to have to be a fixed requirement for the President to notify the Congress.

Beyond the issue of the congressional responsibility in that regard, I further believe that it is very much in the national interest for the President to have the advantage of the institutional wisdom of the congressional leaders. The President obviously has the authority to act as he sees fit without concurrence but had there been some other considerations and some other people participating, perhaps the views of your predecessor, Secretary Weinberger, and Secretary of State Shultz in opposition to the sale would have been the national policy of the United States and that would have been much better for the country.

I might say, Mr. Chairman, we're still awaiting the responses from the Department of Justice on the constitutional issues. I've checked on that a few moments ago and found that they had not responded. We had hearings last week on the constitutional issue and I would hope that the Administration would let us have those materials at an early date so we can give it careful deliberative thought before 3:00 o'clock when we weigh their responses to these weighty constitutional issues.

Thank you, Mr. Chairman.

Chairman BOREN. Thank you very much, Senator Specter.

Senator Warner, any opening comments today?

Senator WARNER. Thank you. Mr. Chairman, despite my great respect for you and the Vice Chairman, I have as yet remained uncommitted on this very important issue. I do so largely because I feel, as a courtesy to the witnesses who are going to come forward today that it would be beneficial to approach this with an open mind and then at the conclusion of the testimony, formulate my opinion.

We're in a struggle not unlike the one we visit from time to time with the War Powers Act. Who has the authority: the Executive branch or the Legislative branch? I've consistently come out on the side that the Executive branch under our Constitution has primary responsibility for the foreign affairs, the external affairs of this country. Mr. Secretary, perhaps you might, in the course of your remarks, touch on that because I think there is some relationship. And, as you know, we have had extensive debate on that issue certainly here in the Senate in connection with the Persian Gulf.

I look forward to your testimony. I believe this is your first appearance, am I not correct, as Secretary of Defense.

Secretary CARLUCCI. Yes, sir.

Senator WARNER. Well, it is an important one. And I wish you well.

Chairman BOREN. Thank you very much, Senator Warner. I might say that if your position of keeping an open mind, examining all the facts, being careful before you reach a conclusion and trying to legislate on a thoughtful basis that became a precedent around here, that it could dangerously upset the way the institution usually functions. So we have to be a little careful about that.

Senator **Warner**. Well, it's kind of nice to have at least one maverick. You're talking about a man who paid the price in the Bork case. You're looking at him.

Chairman **Boren**. Well, you're looking at another one, Senator Warner.

Senator **Specter**. There may be double vision on that subject.

Chairman **Boren**. This is a bipartisan hearing this morning. I have Republicans on the right and on the left of me today as we sit around the table.

But in all seriousness, again, Secretary Carlucci, we do welcome you here on this first occasion of your appearing before this committee as Secretary of Defense.

Let me say I take very seriously all the comments that have been made including those by Senator Hecht as well. This Senator believes that we must give the President the flexibility to act in emergency situations. A committee of 535 Members of Congress cannot deal with sufficient flexibility in emergency situations. This Senator also believes that we must, as I said in the beginning, strike a very careful balance between assuring the kind of accountability that will help our country and, I think, also help our President. I'm convinced that had there been a greater sharing of views including the views of the congressional leadership, and members of the Intelligence Committee, with the President before the Iran-Contra matter, that the kind of damage that's been done to this country by the public disclosures that had to take place during that kind of investigation, as Senator Hecht has said, could have been avoided. So the right kind of process that can avoid damage, can avoid disclosure, can avoid the kinds of actions that make it unsettling for our allies as they seek to cooperate with us on these sensitive matters is really what we are striving for.

I want to assure the Members of the Committee there will be no steamrollers. We want to have the best collective judgment out of this committee. We've had several sessions between our staff and members of the Administration and their staffs, just this week as a matter of fact. We have asked you here sincerely to seek your advice and your best input. And let me express my personal appreciation to you. Both during the time that you have been National Security Advisor and now in your new position, you have certainly indicated time and time again your willingness to sit down with this committee; your own commitment to try to improve the policymaking and the oversight process in a constructive way. I want to express my appreciation to you for the spirit with which we have always been able to share thoughts and I think it has been beneficial to the country. I am pleased to see you in your current position and we welcome you this morning.

STATEMENT OF HON. FRANK CARLUCCI, SECRETARY OF DEFENSE

Secretary **Carlucci**. Thank you, Mr. Chairman.

Mr. Chairman, I have a prepared statement, but in view of the shortness of time, with your a permission, I will submit it for the record and just lead off with a few informal comments, if I might.

Let me say first off, that I agree thoroughly with the sense of this committee on the importance of congressional oversight. You, in effect, are a surrogate public and you contribute to the great strength of our intelligence institutions.

You mentioned that you want to make this legislation as good as possible. And it is in that spirit that I am here. I asked to testify. Partly because of the dialogue that we had. And partly in an effort to work with you in strengthening the oversight process. You will recognize that it is rather extraordinary for even a former National Security Advisor to come up and testify as to events which occurred on his watch so to speak.

Senator Cohen in introducing this legislation indicated that it was designed to correct flaws in the system. Yet, both the Iran-Contra Report and the Tower Commission Report indicated that there were no legislative flaws—that the breakdown had been on the people side, so to speak. And when the President asked me to come into the job as National Security Advisor, I did in effect what any incoming CEO would do with a troubled company. We changed a number of the people, we changed the organizational structure and we changed the procedures. We issued a directive forthwith on the President's instructions directing the NSC not to be involved in covert action activities because in my judgment that was a conflict of interest. The NSC is the overseer on behalf of the President of the process. We established an Office of General Counsel with full authority to delve into any matters in the NSC and report directly to the Assistant to the President for National Security Affairs and that office I might say is a very busy office and functioning very effectively.

In terms of process, we tightened up the management lines and we issued a number of directives including directives which impacted on covert action activities. We specified that all Findings should be in writing. There should be no retroactive Findings. We indicated that the Congress, except in extraordinary circumstances, should be notified within 48 hours. And germane to Senator Specter's point, we indicated that in the event of extraordinary circumstances and the President determined that the delay should be longer than 48 hours, that this delay should be memorialized in writing and should be reevaluated by the NSPG—the NSC in effect—not less frequently then every 10 days. So we established a failsafe mechanism in the case of any delay in notification.

We also agreed to provide to the Congress copies of the Findings and the so-called Memorandum of Notification which traditionally fits the Findings into a foreign policy context. So, in our judgment at least, we took substantial corrective action which is sufficient to deal with whatever problems might arise in the future.

In terms of the specific legislation, you have of course had articulated to you the concerns of the Executive branch. Let me only say from my own experience in the intelligence area, the issue is not an issue of trust between the Congress and the Executive branch. There is nothing more debilitating to this dialog than the finger-pointing on leaks. And I hope we could avoid that. The issue is really perceptions. And if our intelligence assets around the world, particularly cooperating intelligence organizations, perceive that the CIA has no control over the information which is given it, in other words, if the agency is obliged to disgorge whatever the committees may want, if there are no boundary lines, then it is very clear to me, based on my experience, that our intelligence assets will dry up.

I am also, from my DOD perspective, troubled by the provisions in the bill that would confuse the lines of authority between the Secretary of Defense and the Director of Central Intelligence by having subordinate entities within Departments subject to the regulations of the DCI when they are assisting in covert action activities. If I am to be accountable for my organization, they have to be included under my regulations. Indeed, one could interpret the legislation to indicate that subordinate organizations would be providing information directly to the Congress.

It is obvious from what several of the Senators have said that the key issue that you face is the so-called obligatory notification to the Congress: The constitutional issue, if I may put it that way. We've had considerable dialogue on that subject. I am not a constitutional expert. Senator Warner commented on the President's ability to conduct foreign affairs. I can only say that I have served in senior positions under 4 Presidents now and they all felt very strongly about this. The issue of obligatory congressional notification came up time and again. I think it is fair to say that President Carter felt as strongly about this as does President Reagan, and so did past Presidents. Indeed, as I was looking through the material last night, I found that you had a letter from Stan Turner on this subject.

On this point, I will of course defer to the Department of Justice. I can only tell you that the President feels very strongly on this issue. So strongly in fact that I would speculate that should it reach his desk in this form, he may well see fit to disapprove the bill.

In summary, let me point to a quote that you yourself made, Mr. Chairman. I think you talked about Congress being the backseat driver, and if we don't want the Congrress being the backseat driver, the Congress ought to have a role in planning the trip. I agree with that thoroughly. And, as you alluded to, I attempted to work very closely with the Members of this Committee as we drafted the current NSDD on covert action. And I, by the way, have an unclassified version now of that NSDD. If the committee wishes that can be submitted for the record.

I believe quite firmly that the Congress has the tools for effective oversight. We have a new team in the Executive Branch dealing with these issues, and we have procedures; the existing statutes are in place. I think the problem has been fixed. I would argue that we don't need to fix it again by imposing unnecessary constraints on the President and contributing to what could be a debilitating process in our intelligence organizations.

Thank you, Mr. Chairman.

Chairman BOREN. Thank you very much, Mr. Secretary, and your full statement will be entered into the record. We also appreciate your presenting the unclassified version of the NSDD, and that will be entered into the record.

[The prepared statement of Secretary Carlucci and an extract from NSDD 286 follow:]

PREPARED STATEMENT OF HON. FRANK C. CARLUCCI, SECRETARY OF DEFENSE

Mr. Chairman, distinguished members, thank you for giving me this opportunity to participate in the dialogue on the Senate's proposed Intelligence Oversight Act of 1987. After careful review of S. 1721, I volunteered to testify on the proposal, for several reasons. First, as Secretary of Defense and, formerly, as Deputy Director of Central Intelligence and then Deputy Secretary of Defense, I have experience which covers most if not all of the U.S. intelligence community. Secondly, as one who recently directed the National Security Council staff in the aftermath of the Iran-Contra affair, I have a unique perspective on the steps which the President has already taken to improve the national security process, and to assure that nothing like Iran-Contra will be repeated. A third reason for my appearance here today is that, quite frankly, I have deep reservations about the legislation which has been proposed, and I want the members to be aware of my concerns, particularly as they relate to the Department of Defense.

As the sponsors of S. 1721 made clear when they introduced this legislation on September 25, it is a direct outgrowth of Iran-Contra matters which have been, and continue to be, investigated. The argument has been advanced that the existing body of statutes, Executive guidelines and customary practices concerning intelligence activities—particularly covert action—which has evolved over the past forty years is "flawed" and "not specific enough." This is a serious charge, and one which merits close examination. Indeed, once President Reagan was apprised of the Tower Commission's findings, he fuly concurred in the Commission's recommendation "that each administration formulate precise procedures for restricted consideration of covert action and that, once formulated, those procedures be strictly adhered to."

As the members are aware, this administration has formulated new and precise procedures, which President Reagan reported to the Congress on March 31 of this year. Under the new procedures, the main concerns which prompted the introduction of S. 1721 are addressed: there will not be oral findings in the future; such findings will not authorize covert actions retroactively; Congress will be informed of findings within 48 hours except in extraordinary circumstances; and all covert programs will be periodically subjected to review.

As Assistant to the President for National Security Affairs, I presided over the formulation and implementation of the new procedures. The President directed me to instruct all members of the National Security Council staff that they would henceforth be prohibited from engaging in covert operations absent a direct Presidential order. I instructed Colin Powell, who was my deputy and has since succeeded me at NSC, to undertake a systematic review of existing covert operations, to determine whether each one was necessary, effective, and supportive of the United States policy objectives. Based upon this review process, some operations were revalidated, some were modified in light of changing policy objectives or to improve their effectiveness, and others were terminated, based upon a determination that they were no longer necessary or effective.

At the conclusion of this review process, in August of this year, the President signed a National Security Decision Directive which redefined the requirements for covert action policy and subjected every proposed covert action to basic tests driven by the necessity for such action, consistency with U.S. policy, effectiveness of the means chosen, and the likelihood that if the existence of the program became public, the American people would understand and accept their government's choice of this course of action. The new NSDD codifies these criteria and requires annual review of all ongoing covert actions. The directive contains a "sunset clause" under which a covert action program will expire automatically unless it is revalidated annually by the President. I am satisfied that the new procedures are working well and that mistakes such as in the Iran-Contra affair would not recur under the system now in effect.

However, as one of the sponsors of S. 1721 [Senator Cohen] noted when he introduced the bill on the floor of the Senate, "These are policies which do not have the force of law. . . ." His concern, if I understand it correctly, is not with the new procedures, but rather to ensure strict adherence to these procedures. The question I would like to address with you today is, "How do we assure adherence to these guidelines?"

Would the incorporation of the President's guidelines into a statute assure adherence? I believe that the Congress has already answered this question in its report on the Iran-Contra affair. In fact, the report's Recommendations began with the statement that, "It is the conclusion of these Committees that the Iran-Contra Affair resulted from the failure of individuals to observe the law, not from deficiencies in existing law or in our system of governance." In other words, had an intelligence oversight law such as S. 1721 been in existence during the past three years, it is not clear that events such as in the Iran-Contra affair would have been precluded, other things being equal.

I do not believe I have drawn a misleading conclusion from the Congressional Iran-Contra report. Chapter 24 of this report chronicles the evolution of laws and procedures governing covert action, including the investigations by the Church Committee and the Pike Committee in the mid-1970s. I mention these investigations because I served as the Deputy Director of Central Intelligence in their immediate aftermath. I remember this period well; I do not recall anyone in either branch claiming that the new statutory framework for intelligence activities was inadequate. On the contrary, I fully share the Congressional Iran-Contra report's conclusion on page 375 that, "Experience has shown that these laws and procedures, if respected, are adequate to the task. In the Iran-Contra Affair, however, they often were disregarded."

In light of both the Tower Commission's and the Congress's conclusions, it would appear that what is needed is not more or different laws, but an abiding commitment among the intelligence community leadership and the White House staff to adhere to existing laws and procedures, including keeping the President fully apprised of his commitments and obligations. The proposed Senate legislation purports to right the wrongs of the Iran-Contra affair with respect to the conduct of covert operations; but I am of the strong belief that the procedural shortcomings have already been corrected.

Senator Cohen has said that "this bill would place no new restrictions upon the President." I respectfully disagree, and will offer a number of illustrations of why this is so later in my testimony. But new restrictions are precisely what this bill would achieve; otherwise, why rewrite the laws on intelligence activities? For example, this legislation could create serious problems with our allies and other friendly nations in our cooperation on intelligence matters. As you know, S. 1721 does not clearly recognize the importance of protecting methods and sources of intelligence and could create heightened risks of disclosure. A former chief of West German Intelligence recently said in a public forum that legislation of the kind proposed in this bill would prevent any allied intelligence service from rendering any assistance to the United States on covert action. Presumably, this preclusion of assistance would extend to covert counter-terrorism and anti-narcotics programs. Conceivably, the lack of cooperation could color vital alliance matters.

Of equal importance, a law requiring formal disclosure of our own intelligence sources could be expected to have a chilling effect worldwide. The issue here is not whether the "Gang of Eight" or the full intelligence committees of both houses can be trusted to maintain secrecy, as some have suggested. From my own experience in working with the intelligence committees, I have confidence in their ability to safeguard highly classified information. Rather, the problem is that many of our intelligence sources in foreign countries cooperate with us on the condition that the confidentiality of their relationships with us will be strictly protected. The fear that these relationships will be documented at a high level in Washington—particularly after all the revelations in the televised Iran-Contra hearings, which were broadcast to over 100 countries—could be perceived as being tantamount to a death warrant for some of these sources, and a political indiscretion for others, at a minimum. I wish we could control these perceptions, but we cannot. We must take into account the practical effect of this legislation on our intelligence capabilities, however much we may feel that we are misunderstood abroad.

Moving to another concern, if I may quote again from Senator Cohen's remarks on the Senate floor, he said that this bill will clarify "the responsibilities and roles of both branches" and remove "the other ambiguities under current law." Although I take the same view as the Iran-Contra investigators, namely that legal ambiguities are not the problem, I do share this committee's interest in clarifying the division of labor between the Executive and the Congress. That is what brings me here today. Perhaps the most articulate description I have yet seen of what is amiss in our present arrangement was offered by the distinguished Chairman of this Committee, Senator Boren, who, along with Senator Danforth, wrote the following in an essay carried by the Washington Post on December 1: "The President is the Commander in Chief, but Congress gives its advice and consent to treaties and to the appointment of ambassadors. In recent times, Congress has confused this shared responsibility for foreign affairs with incessant and irresponsible tinkering." In fairness to the authors, they had some equally strong words for the Executive branch's conduct of the Iran-Contra activities, but as I have said, I believe the problems in the Executive branch are behind us and that we have learned from recent events.

The intent of this bill, so far as I can see, is to make the intelligence activities of the Executive branch absolutely abuse-proof. This is a laudable goal, and I am entirely in favor of a good, honest, lawful and effective policy process. However, three decades of service in our government have taught me that effective national security management can only come from effective national security managers. No amount of congressional supervision will render our nation's intelligence efforts effective if the people who are managing these efforts in the executive branch are ineffective. We need to hire good people, set proper goals for them, pay them properly, clear away the underbrush, give them the tools to do the job, and provide them with clear reporting lines of command.

My message to the Committee today is simple: President Reagan has put in place new procedures based upon the Tower Commission's recommendations. He has put in place a new team of managers, led by Judge Webster at CIA and Colin Powell at NSC. Why not give the new system and the new team a chance to work?

If the results are satisfactory, as I am confident they will be, a valuable lesson will have been learned. Each branch of our government must be given a reasonable license to carry out its constitutional duties. No one is asking for a blank check or denigrating the essential role which Congress must play in foreign policy. On the contrary, I believe firmly that proper congressional oversight strengthens and has strengthened our intelligence system by demonstrating to the American people that there is an accountability mechanism. But let's have clear management lines, and let's avoid at all costs drying up our sources and methods. I favor the sentiment expressed by Senators Boren and Danforth that Congress should "agree to restrain its back-seat driver activities in exchange for a role in planning the trip."

Congress was not given a role in "planning the trip" with respect to some of the recent Iran-Contra intelligence activities. Based upon the experience since those activities were revealed, however, I see movement toward closer Executive-Legislative coordination in the overall pursuit of our national security agenda, particularly in the area of intelligence. My fear is that new legislation such as the bill before this committee would inhibit and even undermine the positive strides which we have already seen in 1987.

As I noted earlier, S. 1721 would place additional restrictions upon the President. I would like to illustrate that point further by citing what I view as several undesirable potential effects of this proposed legislation on the Department of Defense. I have served as Secretary of Defense for less than one month. In seeking to live up to the high standards of accountability set by my predecessor, Cap Weinberger, I have spent many hours each day informing myself about the responsibilities, programs and procedures for which I am now accountable to the President, the Congress and the American people. I believe that S. 1721 could very well hinder my ability to account for the actions of the Defense Department offices rendering support of any kind to an intelligence activity.

The Committee is well aware that the Department periodically renders assistance to other U.S. Government agencies, including the CIA, pursuant to well-established procedures. Under the present legal and procedural framework, I exercise authority over the activities of Department of Defense personnel, and I must answer for those same activities. However, under S. 1721, Defense personnel rendering support of any kind to intelligence activities could be governed by CIA regulations, even though they might work in the Pentagon. This is a recipe for confusion, not accountability.

Additionally, by requiring the heads of any agencies or entities participating in any way in a special activity to report directly to Congress, the door could be opened for a veritable cacaphony of voices from various discrete component offices within the Defense Department. Conceivably, the Committees of Congress might obtain more raw data on our activities than they would otherwise hear from a single Department representative, although this is not a foregone conclusion. However, I strongly believe that the Committees' understanding of Defense Department activities would be hurt by such an arrangement, not helped.

Because of the compartmentalization of information which is required to protect sensitive classified programs from exposure, our personnel providing support to special activities frequently are unaware of significant features of the activities they are supporting. Indeed, in the case of the Defense Department's transfer of arms to the CIA for subsequent transfer to Iran, none of the many Defense participants in the transfer, other than Secretary Weinberger and two or three very senior aides, knew of the Iran initiative. The General Accounting Office investigated the Department's handling of the Iran arms transfers to CIA and found its actions to have been fully consistent with applicable laws and notification requirements.

I believe this strongly argues for letting Department chiefs continue to speak for their departments. The Congress should give President Reagan's new national security team the opportunity to demonstrate their commitment to accountability and sound management of intelligence activities.

I have other serious misgivings about the potential effects of this legislation on the Defense Department. Military activities currently and properly fall under the authority of the Secretary of Defense. According to S. 1721, some sensitive Defense activities which are not now considered to be intelligence activities would presumably be brought under authorities outside the Department, and entail oversight by a different set of Congressional committees than is presently the case. I hope that this committee will understand why I find this objectionable. In place of clarity, confidentiality and accountability, this bill would appear to risk engendering confusion of responsibilities for oversight of military activities in both the Executive and Legislative branches. And of course, as I have already indicated, the Administration has deep reservations concerning the proposed 48-hour reporting rule, and the constitutional problem this raises has already been addressed by Mr. Cooper of the Department of Justice.

Mr. Chairman, before I conclude my opening remarks and invite the committee's questions, I would like to identify another new restriction on the President. As described on the floor of the Senate by the bill's sponsor, S. 1721 would, "for the first time, provide explicit statutory authority for the President to authorize covert actions." I find that statement to be quite remarkable. It suggests that no covert action by any President since the founding of this great nation has been lawful; yet I do not think for a moment that the sponsors of this legislation would subscribe to such an uninformed reading of our history.

Rather, I believe that the sponsors of this bill wish to insert into the body of American law the notion that the President's authority to conduct our nation's intelligence activities comes from the Congress. On this point, I speak for the Executive branch in saying that we profoundly disagree. We are all familiar with the separation of powers conferred by the Constitution, and specifically the Article II Executive powers vested in the President. Only rarely in our history have these Constitutional duties been given sharper definition. One such instance, which was repeatedly invoked by members of the congressional Iran-Contra committees, and which the Tower Commission saw fit to use as a preface to the Recommendations in its report, was the 1936 Supreme Court opinion rendered in the landmark case of the *United States* v. *Curtiss-Wright Export Corp.* My colleague from the Department of Justice, Mr. Cooper, has already addressed the legal issues surrounding this legislation, but I would like to draw the Committee's attention to the opening statement of the Tower Commission Report's Recommendations. It says: "Whereas the ultimate power to formulate domestic policy resides in the Congress, the primary responsibility for the formulation and implementation of national security policy falls on the President."

My purpose here is not to engage in a Constitutional debate, but merely to point out that an important disagreement exists. One lesson I took from the Iran-Contra affair is that cooperation, trust and collegiality between the branches is an essential ingredient of good government. By injecting this dispute into the laws governing intelligence oversight, S. 1721 would, in my view, undercut the basis for this cooperation, and inhibit this President and future Presidents due to concerns over preservation of their Constitutional prerogatives, when they may be eager to solicit the counsel of Congress.

I applaud this Committee for its efforts to contribute to the integrity of our nation's intelligence activities. In support of that same objective, however, I urge you to leave with the President the authority and the tools to do this job.

Thank you, Mr. Chairman.

EXTRACT FROM NSDD 286

I. INTRODUCTION

A. The Policy Context—

In discharging his constitutional responsibility for the conduct of foreign relations and for ensuring the security of the United States, the President may find it necessary that activities conducted in support of national foreign policy objectives abroad be planned and executed so that the role of the United States Goverment is not apparent or acknowledged publicly. Such activities, the failure or exposure of which may entail high costs, must be conducted only after the President reaches an informed judgment regarding their utility in particular circumstances. To the extent possible, they should be conducted only when we are confident that, if they are revealed, the American public would find them sensible.

This Directive . . . sets forth revised procedures for presidential approval and review, through the National Security Council (NCS) process, of all "special activities" as defined by section 3.4(h) of Executive Order No. 12333 (December 4, 1981).

These procedures are designed, inter alia, (1) to ensure that all special activities conducted by, or at the direction of, the United States are consistent with national defense and foreign policies and applicable law; (2) to provide standards ensuring the secrecy of such activities even when the results become publicly known or the activities themselves are the subject of unauthorized disclosure; and (3) to implement section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), concerning notification to Congress of such activities.

B. The Role of the Assistant to the President for National Security Affairs and the National Security Council Staff—

Within the framework and in accordance with the requirements set forth in NSDD 266, the Assistant to the President for National Security Affairs (the "National Security Advisor") shall serve as manager of the NSC process and as principal advisor on the President's staff with respect to all national security affairs, including special activities. The NSC staff, through the Executive Secretary of the NSC, shall assist the National Security Advisor in discharging these responsibilities. The National Security Advisor and the NSC staff themselves shall not undertake the conduct of special activities.

II. APPROVAL AND REVIEW OF SPECIAL ACTIVITIES

A. Presidential Findings and Memoranda of Notification—

1. Presidential Findings.—In all cases, special activities of the Central Intelligence Agency (CIA) in foreign countries require, under the terms of section 662 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2422), Findings by the President that such activities are important to the national security of the United States. Presidential Findings shall be obtained with respect to all CIA activities abroad, other than those activities that are intended solely for obtaining necessary intelligence within the meaning of section 662 of the Foreign Assistance Act of 1961, as amended.

No special activity may be conducted except under the authority of, and subsequent to, a Finding by the President that such activity is important to the national security of the United States. In all but the rarest of circumstances, no special activity may be undertaken prior to he President's having signed a written Finding. In cases in which the President determines that time is of the essence and that the national security requires that a special activity be undertaken before a written Finding can be presented for signature, and that oral authorization therefore is required, . . . a contemporaneous record of the President's authorization shall be made in writing, and . . . a corresponding Finding shall be submitted for signature by the President as soon as possible, but in no event more than two working days thereafter. No Finding may retroactively authorize or sanction a special activity.

2. Memoranda of Notification.—In the event of any proposal to change substantially the means of implementation of, or the level of resources, assets, or activity under, a Finding; or in the event of any significant change in the operational conditions, country or countries significantly engaged, or risks associated with a special activity, a written Memorandum of Notification (MON) shall be submitted to the President for his approval. All actions to be authorized by means of an MON must be important to U.S. national security as set forth in a previously-approved Finding. An MON also shall be submitted to the President for his approval in order to modify a Finding in light of changed circumstances or passage of time; or to cancel a Finding because the special activity authorized has been completed or for any other reason.

The procedures for approval by the President of an MON shall be the same as those established by this Directive for approval of a Finding.

3. Contents and Accompanying Documents.—Each Finding and MON submitted to the President for approval shall be accompanied by or include a statement setting forth, inter alia, the following:

(a) the policy objectives the special activity is intended to serve and the goals to be achieved thereby;

(b) the actions authorized, resources required, and Executive departments, agencies, and entities authorized to fund or otherwise participate significantly in the conduct of such special activity;

(c) consistent with the protection of intelligence sources and methods, whether it is anticipated that private individuals or organizations will be instrumental in the conduct of the special activity;

(d) consistent with the protection of intelligence sources and methods, whether it is anticipated that a foreign government or element thereof will participate significantly in the special activity; and

(e) an assessment of the risks associated with the activity.

B. NSC Review of Proposals for Special Activities—

Prior to its submission to the President, each proposed Finding and MON shall be reviewed within the NSC process as provided below. The results of such review shall be submitted to the President prior to his determination with regard to each proposed Finding or MON.

1. The National Security Planning Group.—Each proposed Finding and MON shall be reviewed by the National Security Planning Group (NSPG), a committee of the NSC . . . The National Security Advisor shall be responsible for the agenda and conduct of such meetings, at the President's direction. Unless exceptional circumstances dictate otherwise, the National Security Advisor shall circulate the agenda for, and papers to be considered at, NSPG meetings four (4) days in advance thereof.

NSPG members shall review each proposed Finding and MON; their comments, recommendations, and dissents, if any, shall be provided to the President orally, or in writing through the National Security Advisor. The National Security Advisor shall transmit all proposed Findings and MONs to the President through the Chief of Staff to the President. Each proposed Finding and MON shall be coordinated, in advance of its submission to the President, by the NSC Legal Advisor with the Counsel to the President. Under normal circumstances, the NSPG will meet to review each Finding or MON prior to presidential approval.

The President may, however, approve a Finding or MON on the basis of the NSPG members' comments communicated other than in a formal NSPG meeting. The National Security Advisor shall ensure that an appropriate record is made of the President's consultations with NSPG members however conducted, and that the President's decision is committed to writing. The National Security Advisor shall notify all NSPG members in writing of the President's decision with regard to each proposed Finding and MON.

C. Periodic NSC Review of Special Activities—

Not less often than once each calendar year, the NSPG shall review each special activity, and recommend to the President those Findings to be reaffirmed, revised, or terminated. Unless, within thirty (30) days following the conclusion of such review, the President approves in writing the continuation of a Finding, or otherwise directs, such Funding and associated MONs, if any, together with the authority to undertake special activities thereunder, shall be deemed cancelled upon appropriate notice to the DCI or head of such other Executive department, agency, or entity authorized to conduct the special activity. The National Security Advisor shall provide a written report of the results of this review to NSPG members. The Director of the Office of Management and Budget shall ensure that the President's budget provides resources consistent with all Findings for the congressional budget request.

D. Executive Secretary of the NSC—

The Executive Secretary of the NSC and the NSC staff shall assist the National Secruity Advisor and Deputy National Security Advisor with appropriate preparations for, and follow-up to, all . . . meetings relating to special activities. Such assistance shall include preparation of meeting minutes and the development and dissemination of decision and other documents. The Executive Secretary of the NSC shall have custody of record copies of Findings and MONs as approved by the President. The DCI, other members of the NSPG and the head of such other Executive department, agency or entity the President may direct to undertake a special activity, shall be provided with a copy of each Finding and MON as signed by the President, together with the National Security Advisor's memorandum recording the President's decision.

E. Conduct of Special Activities—

Absent a specific presidential decision, as provided in section 1.8(e) of Executive Order 12333, that another Executive department, agency or entity is more likely to achieve a particular objective, no department, agency or entity other than the CIA shall be responsible as lead agency for the conduct of a special activity. Private individuals and organizations used in the conduct of special activities shall be subject to observation and supervision, as appropriate in the interests of proper operational security and control, in accordance with procedures established for such purpose by the CIA, or other Executive department, agency, or entity.

F. Restricted Consideration—

1. Security.—The National Security Advisor shall establish a separate, specially compartmented control and access system at the Top Secret classification level for all policy matters concerning special activities . . .

G. Congressional Notification—

1. The Requirement to Notify Congress.—Consistent with section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), and unless the President otherwise directs in writing pursuant to his constitutional authorities and duties, Congress shall be notified on the President's behalf of all special activities in accordance with this Directive.

2. Contents of Notification.—In all cases, notification to Congress as provided herein shall include a copy of the Finding or associated MON, if any, as signed by the President, and the statement described in section II.A.3 hereof.

3. Prior Notification.—Consistent with the expectation of prior notification to Congress, in all but extraordinary circumstances as specified herein, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall notify Congress, on the President's behalf, through the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter collectively referred to as the "Intelligence Committees"), prior to initiation of each special activity authorized by a Finding and associated MON, if any. In extraordinary circumstances affecting the vital interests of the United States, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall notify Congress, on the President's behalf, through the Majority and Monority Leaders of the Senate, the Speaker and Minority Leader of the House of Representatives, and the Chairman and Vice Chairman of the Senate Select Committee on Intelligence, and the Chairman and Ranking Minority Member of the Permenent Select Committee on Intelligence of the House of Representatives, prior to initiation of a special activity authorized by a Finding and associated MON, if any.

4. Extraordinary Circumstances.—If the President determines that it is necessary, in order to meet rare, extraordinary circumstances, to delay notification until after the initiation of a special activity, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall delay notification consistent with section 501(b) at the direction of the President. Unless the President otherwise directs, not later than two working days after the President signs a Finding or associated MON, if any, the Intelligence Committees shall be notified in accordance with established procedures. In all such cases, notification shall include the reasons for not giving prior notice to the Intelligence Committees. In the event the President directs that notification to Congress be delayed beyond two working days after presidential authorization of a special activity as provided herein, the grounds for such delay shall be memoralized in writing and shall be reevaluated by the NSPG not less frequently than every ten (10) days.

III. SPECIAL ACTIVITIES NOT CONDUCTED BY THE CIA

If, as provided in section 1.8(e) of Executive Order No. 12333, the President directs that an Executive department, agency or entity other than the CIA conduct a special activity, the provisions of this directive shall apply to such department, agency, or entity. In such cases, the head of such other Executive department, agency or entity shall fully and currently inform the DCI of all aspects of the special activity, and jointly with the DCI shall notify Congress of the special activity, in accordance with the DCI's role as the President's principal advisor on intelligence matters as set forth in NSDD 266.

Chairman **Boren**. I think this does represent some very significant progress that really grew out of a cooperative effort between this committee, yourself and others in the Executive Branch, and is very much a positive step in the right direction.

Let me ask one brief question before I turn to other Members of the Committee. You talked about the problem that you had from an administrative point of view of seeing sub-elements of other departments or agencies placed under the DCI administratively. What section of the bill specifically were you referring to?

Secretary **Carlucci**. I believe it's Section 503(a)(3) where it says, each finding shall specify each and every department, agency, or entity or the United States Government authorized to fund or otherwise participate in any way in such activites—and I'm referring to the word entity—and there are sub-entities in the Department of Defense—and then it goes on to specify that any entity other than CIA directed to participate in any way in a special activity shall be subject either to the policies and regulations of the Central Intelligence Agency, or to written policies or regulations adopted by such department, agency or entity, in consultation with the Director of Central Intelligence, to govern such participation.

Chairman **Boren**. The intent was not really to put these entities under the direction or administrative control of the Director of Central Intelligence, but to make certain that if an intelligence operation were carried out by another agency—and I think time and time again we've heard the example, what if the Agriculture Department were asked to carry out a covert operation, would they then still have the same responsibility to report to the Oversight Committees of this action, since the current law uses the term intelligence organizations shall report intelligence activities. I think that the intent is to make sure that the other departments would comply with the relevant reporting requirements as if they were a normal intelligence agency.

Secretary **Carlucci**. Well, that may be a drafting problem in terms of a confusion of the lines of command. But you raise a broader issue, of course, and far be it from me to get into questions of committee jurisdiction. But, we do report in DOD to our own Oversight Committee, and I would be troubled certainly if the definition of covert action in this bill were to apply to the Department of Defense activities. For example, a tactical commander in the field may want to engage in a——

Chairman **Boren**. No, no, no.

Secretary **Carlucci** [continuing]. Disinformation campaign and——

Chairman **Boren**. No. I think what we're talking about is activities carried out pursuant to Presidential findings of the kind of nature that we've all been dealing with in the past. You simply wouldn't want to evade the responsibility or the operation of law, the requirement to be accountable to Congress by saying, well, it's not the CIA, so, therefore, we don't have to report. But, I don't think you're really objecting to that, are you? It's really the problem of the the possibility of a breakdown in the chain of command.

Secretary **Carlucci**. I have some concerns about the administrative lines of command. But you have redefined the term special activities in this bill. In fact, for the first time an effort has been made to make a positive definition of it. I submit that that is an extraordinarily difficult thing to do, and that the way it is cast here, the net is so broad that it would catch a lot of activities that I don't think it is your intent to catch.

Chairman **Boren**. Yes, yes. I understand what you are saying, and we'll take another careful look at that particular section. I understand there's already been some proposed changes that have been developed in that language in consultation with the administration. We'll look at that very carefully.

Senator Cohen.

Senator **Cohen**. Thank you, Mr. Chairman. There's something else quite extraordinary today, and that is the declassification of the NSDD. This comes as a surprise—a pleasant one, but a surprise nonetheless since the committee was unable to even have a copy of the classified version of the NSDD except to review on the premises and not to retain so that we could go over it very carefully. So, for the first time to have it declassified before the committee is again, a surprise, nonetheless welcome, but we have not had a chance to review it.

I want to assure my colleague, Senator Hecht, that nothing will be said during the course of these proceedings that will in any way jeopardize our intelligence agencies or our relationships with other nations. We'll have a former Deputy Director of the CIA who will talk about the importance of notice to Congress, the importance that it has for maintaining the integrity of the Agency itself, and I will assure my colleagues that nothing said here will in any way jeopardize the nature of the Agency's integrity.

Secretary Carlucci, you indicated in your statement that the Iran-Contra Committee found no legislative flaws—simply a breakdown in people; that the Administration found no legislative flaws in its system—simply a breakdown in personnel. And I want to commend the President for making those changes in personnel. But if it was only a question of changing personnel, why did the Administration feel that it had to change its own internal policies and regulations?

Secretary CARLUCCI. It was less a question of changing those policies, Senator Cohen, than it was my feeling in consultation with the President that our people needed clearer guidelines under existing legislation. So what we did in working with the committee is to try and clarify the procedures. I am not arguing that everything was perfect when I came to the NSC. Indeed, as I indicated, as an incoming CEO I found a troubled company. So I took what I thought were the appropriate measures. But that is a far cry from recommending fundamental changes in statute on the process of legislative oversight. I don't think anybody argued either in the Iran-Contra report or during the proceedings of the Tower Commission that the intelligence oversight legislation was flawed.

Senator COHEN. Well, as I understand what you're saying then, that we had existing procedures within the Administration that were adopted pursuant to statutes that had been passed by prior Congresses; that there was some ambiguity or doubt about the implementation of those procedures as well as some doubt about personnel who were carrying them out. So what you did, in effect, was to clarify what you believe the existing statutes and regulations required by saying, No. 1, we should have no oral Findings. That was a clarification of a rule that should have been applied before.

Secretary CARLUCCI. Correct.

Senator COHEN. Every finding shall be in writing. That, by the way, is required by this statute, which simply is a clarification of existing law. No. 2, there should be no retroactive findings. That, again, is a clarification of prior practice that should have been employed prior to the Iran affair. That also is required by this legislation, so there's no conflict. No. 3, the NSC ought not to be involved in operations. Again, that is simply conforming to what everyone thought was the prior policy—or should have been the prior policy—and that also is what this legislation does.

Secretary **Carlucci**. Covert action operations. The word operations in a broad sense——

Senator **Cohen**. Covert activity.

Secretary **Carlucci**. Covert activity.

Senator **Cohen**. Right. So, in essence, what you did was to clarify existing law and procedures, and in essence what we have done in this law is exactly the same thing, precisely the same thing on those key elements. So there's no conflict in terms of what you seek to do and what we seek to do. We are, in fact, on the same parallel track.

Now, one thing that I think is perhaps—well, let me go back here a moment. You made the statement that there is no control over information given to Congress, that we're going to lose credibility with our allies. I would agree. But are you suggesting that there has been no control to date over information given to Congress?

Secretary **Carlucci**. No. What I am referring to is the provision in Section 502 that obliges a Director of Central Intelligence to give you whatever information you request. There has traditionally been well understood boundaries. For example, sources and methods—very important. Internal Executive Branch deliberations—there you get into issues of Executive privilege.

Senator **Cohen**. There's no claim under this legislation that executive privilege does not apply to those areas not required by existing law.

Secretary **Carlucci**. Well, I consulted with my lawyers just prior to this hearing, and they indicated that they see some conflict there, so I suggest that that is an area that we need to straighten out.

Senator **Cohen**. Well, let me straighten it out if I can right now. There's a question about sources and methods. I think I indicated on the day that I testified before the committee that I was quite prepared to amend the proposal to take into account the legitimate concerns of the Administration. Would you have any objection to language such as, the Intelligence Committee should be appropriately informed of participation of any government agencies, private parties, or other countries involved in assisting the special activities.

Secretary **Carlucci**. I don't have a real problem with other government agencies if the word substantial is used because you might want to go out and borrow a screwdriver from some agency or something like that. I have some problem with other governments—having worked with other governments in the intelligence area there.

Senator **Cohen**. Do you have a problem with that language that's used there?

Secretary **Carlucci**. The other governments are just extraordinarily sensitive on this point, and I think you've already had testimony before you on the Canadian Embassy rescue operation where the Canadians indicated that if the Congress was to be informed, they wouldn't cooperate.

Senator **Cohen**. I guess what I'm—are you troubled by that language?

Secretary CARLUCCI. I'm troubled by "other countries." Yes. But, I really—I'm not equipped to get into wordsmithing in this hearing. I'd prefer to have——

Senator COHEN. I don't want to take advantage of the situation, realizing that you're in a new position with different responsibilities. But, the reason I quoted that language is that is the language that President Reagan drafted in sending a letter to Chairman Boren and myself. It's contained in Section 4 of a letter that he sent to us. The date of the letter—and I'll get it precisely here—well, undated on top of the letter—but, a letter to Senator Boren, and that's paragraph 4. "The Intelligence Committee should be appropriately informed of participation of any government agencies. private parties, or other countries involved in assisting the special activities." So, the reason I'm asking the question is that if it's OK with the President, and he's assured Chairman Boren and myself that this is——

Secretary CARLUCCI. Let me give you a little background on that because we did not—at least I was not aware of this in the NSC when we were drafting the regulations, and this was included over the objections of a number of people, including some people in the CIA as it applied to foreign governments, only when we discovered that Director Casey had made that kind of an agreement already with the committee. Your question to me was, am I troubled by it? Yes. We are simply fulfilling an agreement that Director Casey had made.

Senator COHEN. This was long after Director Casey. This was from the President.

Secretary CARLUCCI. No, I understand. But he was the first one to agree to that.

Senator COHEN. All right. But the point is that the President, as recently as several months ago, reaffirmed that this would be part of his policy.

Secretary CARLUCCI. We will live with that. You asked me if I was troubled. I am troubled.

Senator COHEN. Well, you will live with that. And if I were to include that in the legislation itself, I assume if it's all right for the President to air this in a public letter to Chairman Boren and myself, then the Administration will live with that language.

Secretary CARLUCCI. All right.

Senator COHEN. Actually, what it comes down to is really the obligatory notification to Congress. That is the major point of contention in this legislation. I think all of the other points we can work out and try to take into account Administration concerns—the clarifications and improvements, and we spent the last 2 days doing that. I think we've achieved that. The basic problem comes down to the obligatory notification to Congress itself. One thing that you've indicated—and I might point out to my colleague, Senator Hecht—when Mr. Gates was being considered for the nominee for the Directorship, I recall him testifying that he could not conceive of a situation in which notice should not be given to Congress within 48 hours or 2 days after the initiation of such covert activity. Director Webster, during his confirmation proceedings, reiterated the same thing. We are going to have John McMahon, former Director Deputy of the CIA, also indicate that Congress ought to be notified within that time frame. These gentlemen, with their vast experience, have not found an example in their cumulative experience in which notice to the Congress of a covert activity has jeopardized those activities. Indeed, I think that testimony will be just the opposite. It will strengthen the agency rather than undermine it. And I'm curious as to why the Administration is so adamant in opposition to simply notifying eight Members of Congress—the leadership of the United States Congress—of a covert activity being carried out to further a foreign policy.

Secretary CARLUCCI. As you are aware, Senator Cohen, I too served in the CIA, and I can't cite you a past example where indefinite deferral of notification would have been necessary, although I can cite you two examples where the Congress was not notified in advance. And I think justifiable examples.

Senator COHEN. But can you cite me one example where it would have jeopardized lives?

Secretary CARLUCCI. One can speculate, but I don't think that's the point. The point here is that this is a fundamental separation of powers issue. I indicated in my opening remarks that I was really not the best person to address that issue because it's a constitutional issue. This isn't a question for the Director or the Deputy Director of the CIA. This is a question for Presidents, and Presidents feel strongly about their constitutional responsibility to conduct foreign policy.

Senator COHEN. Let me come back to the point then. Do you subscribe to the notion that a president could take action that would be inconsistent with an existing policy, or even law, declare it to be a covert activity and then withhold notice to the Congress for a period of 10 months, 14 months, or longer?

Secretary CARLUCCI. No. I think the President is——

Senator COHEN. In his sole discretion he has that power. Is that——

Secretary CARLUCCI. The President is charged with faithfully executing the laws of the nation. So, no, he would not do anything in violation of law.

Senator COHEN. No, not violation. The testimony during the Iran-Contra affair was by the Department of Justice that even though there was an existing law on the books, the President could circumvent or disregard that particular provision by declaring it a covert activity, that he could have different powers under the covert action as opposed to a public policy. And, if that is the case, you might have, for example, a prohibition—a statutory prohibition—against transporting weapons to, let's say Iran, or any other terrorist-sponsoring country. And yet the President wants to open up a new relationship with Iran, and therefore declares a policy action to be covert. In so doing he therefore, undertakes that covert activity without notification to Congress for as long as he feels it's in the best interests of the country. In your view, is that a scenario that you can subscribe to?

Secretary CARLUCCI. I take it you're also referring to the section in the draft legislation, 503(a)(5), a finding may not authorize any action that would be inconsistent with or contrary to any statute of the United States. This business of attempting to close every conceivable loophole that a President might find under some yet to be defined circumstances can also result in some damage to our foreign policy equities. Once again, I'm not a lawyer, but as I read this provision, if we are shipping arms under a covert action finding, that may appear inconsistent with the Arms Export Conrol Act. So, which law governs? So I think this particular provision would set up some conflict there. Obviously, I am not going to be put in the position of saying Presidents ought to disobey the law. And it's a question of what you're dealing with is a question of constitutional responsibilities versus statutory responsibilities. And, as we say in the Pentagon, that's over my pay grade.

Senator COHEN. One final point. With respect to the notice under the NSDD, the point is that with NSDD directives, they can be changed, disregarded at the discretion of the President at any time with or without notification to Congress. I assume that's one of the reasons why we want to put it in statutory language. But, second, you point out in the NSDD that we have a provision which would require a re-evaluation of a covert activity under which notice has not been given to the Congress, every 10 days.

Secretary CARLUCCI. That's right.

Senator COHEN. Theoreticaly, that means that a President could defer notification for weeks, for months, or possibly even longer than a year, simply by reviewing it every 10 days.

Secretary CARLUCCI. Well, that is correct, although it says NSPG which means it's quite a painful process. The President would have to convene an NSPG every 10 days and go over this and hear from his advisers. You cited the example of two advisers who objected to the arms sale to Iran. He'd have to hear from those advisers every 10 days, and that might be quite an enervating process. If that's the loophole you're trying to close, I think this does the job.

Chairman BOREN. Thank you, Senator Cohen. Senator Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman. Mr. Carlucci, it would appear that we're in a situation where you've voiced your opposition to the bill with regard to it's lack of flexibility or the ability of the President, under extraordinary circumstances, to have an alternative. Quite clearly, this legislation addresses 48-hours as mandatory. I don't know whether there's any common ground, or area for compromise or an alternative. I would think that if we had the time, Mr. Chairman, to go down through each of our mutual concerns, why, perhaps, they could be adequately addressed. For example, you said you oppose the 48-hour provision in the bill because you fear that other countries will hestitate to cooperate with us fearing disclosure to the Congress. But, my concern in that example is the credibility of just that. Indeed, wouldn't the other countries have to assume that their cooperation with the United States would be disclosed to the Intelligence Committees because that's policy of our country. So, if they start internally second guessing, recognizing we have a mandatory oversight responsibility, you know, I just question whether that kind of a concern is a legitimate concern, recognizing the obligation we have.

Secretary CARLUCCI. Senator Murkowski, I don't know how many times when I was in the CIA cooperating intelligence organizations expressed their concern on this subject. Certainly it was numerous. They will frequently tell you that well we will give you this information providing it does not go to your Congress. Now that may be unfortunate. And that's not the way we look at things. But it is the way they look at things. So we're dealing—in this case perception becomes reality and if we are interested in maximum intelligence effectiveness, we have to take this into consideration.

Senator **Murkowski**. One would draw the conclusion that the Congress would be considered less trustworthy in keeping a secret than the Executive branch. And one—and that's not the case, but obviously that leaves us with——

Secretary **Carlucci**. I'm not making that argument.

Senator **Murkowski**. I know you are not. But that's a conclusion one has to come to as a consequence of where we are.

You know, we've had an experience and it was an unpleasant experience not only for this committee but for the Administration. And as a consequence, if we had had notice in a reasonable manner, things may have been different. But that's hindsight. We'll never know. What we are trying to do, in a responsible way, is look at appropriate legislation so that the risk is lessened.

Now, you know, we don't want to leave a loophole that can be abused. And this Senator is not necessarily wedded to this absolute language. But to suggest that there would be this broad area where the extraordinary circumstances as judged by the President and his immediate advisors isn't subject to reasonable oversight, you know, just leaves us at an impasse. We have got a policy void here and I appreciate what you have to do. The President's elected. He's held responsible. His people are held responsible to him. But it would seem to me very helpful if you could come up with some constructive suggestions on how we can maintain an oversight of responsibility within a reasonable framework that doesn't allow for an abuse or a loophole.

Secretary **Carlucci**. I agree with that formulation. But that, once again, begs the constitutional question. We can certainly agree on process, procedures, on the boundary lines of providing information. But Presidents, and not just this President, feel very strongly about their constitutional prerogatives and therefore they are inclined as was President Carter when I was in the CIA to insist on that right to withhold information if necessary. And that may be unfortunate. You view it as damaging to the oversight process. They view anything else as damaging to the oversight process. They view anything else as damaging to their ability to conduct foreign policy. And I'm not equipped to suggest to you at this hearing a compromise on that fundamental constitutional issue.

Senator **Murkowski**. Well, I understand that you do understand the concern that this Senator has because we did see an abuse and it was unfortunate and had we—that's the whole purpose of this exercise, as we're all aware. And you know, if the Administration is just going to say no, then we're at constitutional loggerheads and I assume that it will be a full employment act for the attorneys like a good deal of other activities around here.

Secretary **Carlucci**. Well, it is very similar to the War Powers debate if I may say so. And I don't want to get into that.

Senator **Murkowski**. It is. It just leaves us at both ends of the spectrum. And you know, that's unfortunate. I am not looking to make a major policy change or looking to change the flexibility of the President or his responsibilities, but I'm not satisfied with the system now because, frankly, it was abused badly.

It wasn't a question of leaks. It was simply a question where we had no knowledge until after the fact. I've sat on this committee, Mr. Carlucci, and felt that if I didn't ask the question just absolutely correctly, I wouldn't get the information. And you know that's not appropriate but that happens. It isn't the President's wish but it is a function of the process of covert activities.

Secretary **Carlucci**. Let me argue with that point. I do not think it is a function of the process of covert activity. And that's the very point I was trying to make in my testimony and in my extemporaneous remarks.

Our reading of the Iran-Contra report and of the Tower Commission report is that it was a breakdown of people and it was due to the kind of hothouse atmosphere that existed. The overemphasis on secrecy. What I'm arguing before this committee is that all of that has changed. We've created a new atmosphere, a new atmosphere of cooperation with the Congress and the NSC. We've created a new set of procedures. We've brought in a new set of people. New leadership in the institutions. And there are some problems that do not lend themselves to legislative solutions. They lend themselves better to people and process solutions and I would argue that this is one of those.

Senator **Murkowski**. Well, I commend you for instituting new policies and procedures which were obviously necessary because the system wasn't working correctly. The system was there. So you've taken corrective action, and I think the Senator from Maine indicated that's what this effort is all about, to initiate corrective action. But if there is not a middle ground, why obviously we know where we are going. We're going to the Supreme Court for a ruling on it. And maybe that's it. I don't know. I think the dialogue has been helpful to me because I do understand and appreciate your concern.

You know, one can conclude that the report that came out of the Iran-Contra hearing urged changes such as are proposed in this legislation, as well. But that's neither here nor there. It's just one of those things. There are several ways of looking at it.

I have no further questions but I think the Senator from Maine has one.

Chairman **Boren**. Did you want to make a point?

Senator **Cohen**. Secretary Carlucci, you indicated there have been changes in personnel and a change in procedures and indeed there have. But you know that we have another election coming up, and that perhaps a different party will be taking power. Hopefully not, from our perspective. But you may no longer be here next year and so we have no guarantee in terms of the continuity of those procedures, personnel, atmosphere, environment.

And that is the reason why if the changes that we are making are in fact quite consistent with the exception of the notice, the 48-hour notice, then it seems to me that this is an appropriate thing for us to pursue to make sure that we try to maintain the same line of propriety——

Secretary Carlucci. I would only argue that we need to be very careful about the boundary between necessary legislative action and appropriate administrative action. We have to allow our Presidents to administer.

Senator Cohen. The basic difference between your testimony and what is being said up here is the question of timely notice. Whether or not Congress, under the constitutional scheme of things, is entitled to have timely notification of a covert activity which has been initiated by the President of the United States without prior notice.

And what you are saying is that under your definition or that of the Department of Justice, timely notice, in essence, is whatever the President says it is.

Secretary Carlucci. Well, I'll defer to the Department of Justice. But that's not my reading of that. The word timely does have meaning. And——

Senator Cohen. At the Department of Justice they have indicated the President has the sole discretion to decide what is timely.

Secretary Carlucci. And the President feels very strongly on that, Senator.

Senator Cohen. So do we.

Chairman Boren. Senator Hecht?

Senator Hecht. Thank you, Mr. Chairman.

To answer my distinguished colleague from Maine, I certainly disagree with you. I think just having this hearing jeopardizes our intelligence gathering capabilities around the world. Just as I think that we were hurt in a terrible manner by the Iran-Contra publicized hearings. And so we——

Senator Cohen. We were hurt in the Iran-Contra by the fact that the action was initiated by the Administration. That's what hurt this country.

Senator Hecht. Well, we have a basic disagreement and so as Bob Dole would say very eloquently, one of us is wrong. And so we'll go on from there on that.

I think also we have a responsibility in Congress. Now, we're talking about the Executive branch talking to us. You know, let's look back 2 years ago in this committee, in my opinion, it leaked like a sieve, in plain language. There was constant, constant oratory on the morning TV and in the press. I think we have to take more responsible positions. I remember during that time I had many conversations with the late Bill Casey. And I said, you know, you have to be very careful. And we do have leaks.

Now, Mr. Carlucci, you were in the CIA, you say. You said. Is it not true that you were polygraphed from time to time?

Secretary Carlucci. I was what?

Senator Hecht. Polygraphed.

Secretary Carlucci. Oh, yes. At least twice. I volunteered to take a polygraph.

Senator Hecht. Are you aware that the staff of the Intelligence Committees are not polygraphed?

Secretary Carlucci. I am aware that polygraphs are not used up here, yes sir.

Senator Hecht. And——

Senator **COHEN**. Are you aware the Secretary of State has not been polygraphed and refuses to be polygraphed?

Senator **HECHT**. I am definitely aware of that. But I don't see how that has relevance to the staff of the Intelligence Committee. I never have found that and I'm not advocating every Senator has to be polyographed. But I certainly think the staff should be polyographed.

Let's get back again to some other questions in this. We have not really defined what is covert, and I do not want to right now, and what is clandestine operations, because one could lead to another. But we have to be very, very careful because in reality they are very, very close, and this is that type of situation.

We're not like the Second World War where we have the luxury of several years to build a military force. We have to react on a dime to use an expression. If you have to make a spontaneous action, the Secretary of Defense along with the President, and we're out of session, and you have to move and people might not be around, is there any way possible you could round up 8 people and come up with a decision when you thought the security of America was threatened?

Secretary **CARLUCCI**. Oh, I think there are examples. It depends on how the legislation is worded, of course, Senator Hecht. You know, whether it is a good faith effort or whether it's an absolute requirement. But there are certainly examples of are being unable to locate Members of Congress in circumstances of emergency.

When Congress is not in session, there is a good amount of travel. And I myself have experienced frustrations. I know the President has talked about frustrations in locating Members of Congress. So you see it is a practical problem. Yes.

Senator **HECHT**. Well, it's the security of the country that sometimes could be threatened and obviously our enemies would understand when Congress is out of session, it is difficult to get a decision. Wouldn't that send out the wrong message?

Secretary **CARLUCCI**. Yes. I think it does. If we are viewed as indecisive, that's one of the problems that Senator Warner and I have discussed along with Senator Boren with the War Powers Act. It creates an atmosphere of indecision. And that badly damages us around the world.

Senator **WARNER**. Badly damages? I missed the word.

Secretary **CARLUCCI**. Damages us around the world.

Senator **HECHT**. Thank you, very much.

Chairman **BOREN**. Thank you, Senator Hecht.

I would want to interject here and I think Senator Hecht would agree with this. I think he has supported strongly the new procedures we have put in place in this committee in terms safeguarding of classified documents and notes which can't leave our space, and the removal of Members with the support of the joint leadership if any leaks occur. I think he would agree with me, as Judge Webster has indicated to this committee, that since these new rules have been in place, there have been absolutely no leaks out of this committee. This is a responsibility I think the current membership of this committee takes very, very seriously.

Senator **HECHT**. I certainly congratulate you on that but in reference to what the distinguished Senator from Maine said, the next election, who's going to be here. And I think we should make safeguards from right on out. And I think that we have not done that. And I think certainly polygraphing the staff would send a message in the right direction.

Chairman BOREN. Senator Warner?

Senator WARNER. Mr. Chairman, I yield to the Vice Chairman.

Senator COHEN. One point. In terms of locating 8 Members of Congress, my understanding is that the Reagan Administration, with the exception of the Iran-Contra affair has never encountered any difficulty in locating the Chairman and Vice Chairman of the intelligence committees of the House, the Senate, or the leadership if necessary. There was only one occasion in which notice was not given. That happened to be the Iran affair. But prior to that time, with the possible exception of the mining of the harbors, my understanding was that this Administration has found it very easy on each and every occasion to notify Members of Congress who had the need to know about covert activities.

Secretary CARLUCCI. If my memory serves me correctly, the difficulties that I was referring to go back to the Carter Administration. I think there was an instance in which they had difficulty locating——

Senator MURKOWSKI. Mr. Chairman. On that particular subject, as both the chairmen are aware, we have had a little problem internally within our committee as well as far as notification in a timely manner to the Members. And that's an internal matter that I think we've addressed. But I want to make sure that everybody understands the problem is not just one way. It can work internally as well.

Chairman BOREN. Senator Warner?

Senator WARNER. Chairman. First I want to indicate clearly that I support the Chairman and the Vice Chairman in bringing this issue forward and having these hearings to focus on it.

I think these are proper and judicious steps in light of the seriousness of this question.

I turn now to the 48-hour rule which is the area that concerns me the greatest. In concluding a response to Mr. Hecht, you touched on the allied or friendly nation participation. Hypothetically, if we had such a rule, how does that impact on the likelihood of other nations associating with the United States in the performance of a covert action.

Secretary CARLUCCI. Adversely. I think you need to bear in mind, reflecting on what Senator Murkowski said, these countries just have to understand our institutions. You are dealing with countries, by in large, in the intelligence world, that don't always understand our institutions, that have very different institutions of their own. And they simply cannot appreciate the importance of the oversight mechanism and the cooperation between Congress and the Executive branch and are basically mistrustful of the dissemination of information beyond the Executive branch.

Now I can't tell you how much cooperation will be lost. Because we never know. All I could do is cite concerns that have on occasion been expressed to me, both in my intelligence hat and subsequently, that you people in the U.S. Government cannot keep a secret. That applies to the Executive branch as well, by the way.

But we have a great deal of problems with that. And if you are going to let our participation be known to the Congress, we don't think we can cooperate. That happens.

Chairman **Warner**. Without going through the whole litany of other nations, actually there is no parallel to my knowledge with a major Western nation in terms of this sharing between the Executive, so to speak, and their legislative, their corresponding entities?

Secretary **Carlucci**. Senator Warner, I'm not an expert I can't think of an exact parallel. I think Canada and the U.K. have evolved more in that direction. But I don't think there——

Senator **Warner**. They haven't gone as far as we have.

Secretary **Carlucci**. No. No.

Senator **Warner**. This a question you may not be able to answer now, but I would hope you would provide for the record an answer.

As I read through section 502 of the bill, the Cohen bill—and that's on collection of intelligence—and 503 on the covert operations, I'd like to have you provide for the record that it is your judgment as Secretary of Defense that your Department would be completely embraced within this legislation and its definitions. Specifically. I'm interested in your judgment that there's just no chance, other than a willful violation, should this or something like it become law, of a small group somewhere in the world operating perhaps with the best of intentions, along a border should we say, with a hostile nation, of conducting any activity without your knowledge and, in turn, your fulfilling your responsibility to advise the President and the Executive branch.

I'm just concerned. We can't get into the details, but there have been some operations in the Department of Defense——

Secretary **Carlucci**. Oh yes. I agree.

Senator **Warner** [continuing]. In the past and recent?

Secretary **Carlucci**. Oh yes.

Senator **Warner**. Which, in the judgment of this Senator, bordered on what we are talking about here, and that troubles me greatly.

Secretary **Carlucci**. Let me tell you what I did in that case. I think you are referring to some things that went on when I was Deputy Secretary.

Senator **Warner**. Yes, that's correct.

Secretary **Carlucci**. And I had had the experience in the CIA and I set up procedures in the Pentagon that were very similar to the procedures that exist in the CIA and in fact invited the CIA to take a look at them. And I think those are now functioning satisfactorily, although I have not had time in the short period that I have been in office to re-examine that issue.

But I think there are now adequate controls in place in DOD.

Senator **Warner**. Let me finish. I just want your assurance, having gone back to read 502 and 503 that, if a piece of legislation evolves along this line, that it puts a blanket over everything in the Department of Defense.

Secretary **Carlucci**. I am troubled by that. And let me be clear here on the record, this broad definition of covert action and the application to the Department of Defense could result in some circumstances where tactical commanders could not make decisions without coming all the way back up through the system. It could result in confusion between committee jurisdictions. You're on the Armed Services Committee. We report to the Armed Services Committee. Before you get into the business of regulating what might be defined—and is not currently defined as—but what might be defined as covert action activities in the Department of Defense, I suggest to you that you go through a whole other hearing process because it's a very complicated subject.

Senator **Warner**. Well, now, Mr. Chairman, that brings me to something that is of great concern to this Senator, because we have drawn this very carefully to apply to all agencies and departments of the Federal Government. I am sure you have had an opportunity to glance through this.

Secretary **Carlucci**. I think it's a definitional problem, Senator Warner.

Senator **Warner**. All right. But we ought to clear it.

If you put something into law, it should be written properly. And now is the chance to get it corrected. So would you undertake to work your staff——

Chairman **Boren**. Senator Warner, we've been working with the Executive branch even this week. It is my understanding that when we get into the definitions of covert operations and activities, we have returned to or informally agreed to use as the basis of our mark-up, the Executive Order definition.

Secretary **Carlucci**. That clears up that problem.

Senator **Warner**. Because some of the copies we have up here——

Chairman **Boren**. That's not reflected yet. That's really been a matter of informal negotiations with the Administration and——

Senator **Warner**. I've made my point. And you give me the assurance and the Secretary likewise that that gap's been closed.

Chairman **Boren**. Mr. Cohen?

Senator **Cohen**. Let me respond to Senator Warner. I know he has to leave.

With reference to the identification of third countries, I don't think the Congress of the United States ever wants to find itself in a position in the future that country 1, 2, 3, 4, or 5 or 9 is participating in a covert activity, supplying 15, 20 or 30 million dollars to carry out that covert action, and no notice of that participation ever being given to Members of Congress who would then be at least shielded from that knowledge not knowing whether implied or express promises have been made to that country in exchange for its activity. That was the reason for it. That's the first point. I think we are entitled to that kind of knowledge.

Number two, you were not here earlier when I read a letter from President Regan to Chairman Boren and that letter contained a paragraph which said the following, "The Intelligence Committees should be appropriately informed of the participation of any government agencies, private parties or other countries involved in assisting special activities." So we were simply seeking to put into legislation what the President had agreed should be the policy of this Administration, and I would assume, any Administration.

The third point is that I am prepared to work out a formula whereby it can be achieved without causing the kind of disruption that Secretary Carlucci has at least alluded to.

Chairman **Boren**. Perhaps not in the statutory language.

Senator **Warner**. I think we're gravitating towards a common result here.

My question was more along the lines, if we decided that the United States should conduct a covert action in a country, and we simply needed some basic intelligence from another country to support that operation in a more efficient, effective way, there may be some reluctance to share. Wasn't that the point that you and I raised?

Secretary **Carlucci**. That's the point I'm making. You could certainly do what you have suggested, but you pay a price for it. And I think we have to recognize that.

Senator **Warner**. Can you think of scenarios by which it would just not be in the best interest of the United States for a President to inform a Congress in this——

Senator **Cohen**. Eight Members of Congress.

Senator **Warner**. That is correct. Eight Members of Congress. I can think of some.

Secretary **Carlucci**. Yes. Where human lives are at stake. Yes, I can think——

Senator **Warner**. Well, that's a broad range. But supposing, for example, a nuclear weapon were stolen somewhere in the world. And it was incumbent on the President to have a covert operation to go in and try to recover that weapon. Now that's the sort of thing that we created the nuclear risk reduction center which is now being implemented. Those are the types of scenarios that concerned many of us at the time we fostered that idea.

And this is a category which concerns me a great deal.

Secretary **Carlucci**. Well, that is one category.

Senator **Warner**. The loss of life, it seems to me, is inherent in so much of this business. It is quite general, and it might not provide a standard.

Secretary **Carlucci**. I understand that you have had an exchange earlier on the Canadian Embassy rescue operation. But I think that's a good case. Now we did inform after the fact. But it's conceivable that that undertaking could have dragged on for a considerable period of time.

And I think the President needs to have the authority to withhold information. I gather Senator Rudman said he would have made a different decision. Well, I was one of the decisionmakers and I would not have, in retrospect. Because I think those people would still be there had we not agreed to withhold that information.

Senator **Cohen**. Can I follow that up, Mr. Secretary?

What would be a situation where a country, be it Canada or someone else, after having carried out such a covert activity then comes to the President and says Mr. President, please do not disclose our participation in the role of extricating these hostages because it will undermine our ability to operate in that region of the world in the future. And we are begging you not to disclose those activities.

Are there circumstances that the President under the definition of timely notice say we are not going to disclose it because it's going to involve lives in the future as well as those in the past. It might undercut the ability of that country to function?

Secretary **Carlucci**. Well, those are the kinds of excruciating choices that we elect and pay our Presidents to make. He's got 6 lives in the balance. He's got an oversight consideration to weigh against those 6 lives and he has a friendly country that says if you inform the Congress at any time, you cannot rescue these people.

Now, I don't think you and I and certainly not 535 Members can sit back and second guess a President on that.

Senator **Cohen**. If we allow other countries to start dictating what our constitutional process is going to be—and we have a major difference on that—it seems to me we are starting down a very dangerous road.

Secretary **Carlucci**. They're not dictating——

Senator **Cohen**. You cannot tell Congress; if you do we won't help you. And if we accede to that, I think we're making a terrible mistake.

Secretary **Carlucci**. Well, they're not dictating our constitutional process. They have every right to tell us that they're not going to cooperate with us in a rescue operation out of their own Embassy unless we do it under certain circumstances. And that isn't tampering with our constitutional process.

Senator **Cohen**. Sure. They have every right.

Chairman **Boren**. Senator Warner?

Senator **Warner**. Mr. Chairman. One further question. I understand our witness does have to return to the White House for a meeting with the President.

Can you give me your opinion on the Inspector General. We've sort of formed government-wide a pattern, of having Inspector Generals but there's reluctance to have the Central Intelligence Agency conform to the otherwise government-wide pattern.

What's the grounds in your opinion for an exception?

Secretary **Carlucci**. I think Director Webster has already testified on this, and I haven't acquainted myself thoroughly on that subject, but I would go back to the creation of the Inspector General's office in the Department of Defense, where I did testify a number of years ago. And I think we argue very strongly that national security entities are really sui generis here; that you have a situation where the ultimate person accountable—in this case the DCI—may have to order that information be withheld in the interest of protecting human lives, overriding national security concerns, whether it is your nuclear example or some other. And he therefore has to have the Inspector General under authority, under his or her authority in case those circumstances arrive. So you can't have unfettered reporting lines between an Inspector General and the Congress in those kinds of organizations.

Chairman **Boren**. Thank you very much, Senator Warner.

Senator **Hecht**. May I ask clarification from the Senator from Maine. I don't remember too much from business law, but one word I do remember is intent. Is it your intent to stop us from working with third world countries on different operations?

Senator **Cohen**. Senator Hecht, there was no intent to stop us from operating anywhere in the world. The intent is to require any Administration, this Administration, or any future Administration to provide timely notice, meaning within 48 hours after the initiation of a covert activity, period. That is the intent.

Senator **Hecht**. But you mentioned about third world countries, you do not want to have money used by a third world—what was that you just mentioned a few minutes ago?

Senator **Cohen**. What I made a reference to was the fact that other countries may be participating in carrying out covert activity contributing either personnel, manpower or substantial amounts of money, carrying out a particular policy which is undisclosed to the Congress of the United States. That to me is not a policy to be enshrined with future practice. It ought to be at least disclosed to the committees that a country is in fact participating.

Chairman **Boren**. The Chair hesitates to ever try to impose order on the committee or to constrain the discussion here, but I know Mr. Carlucci has to leave here momentarily. We have three other witnesses that have generously shared their time, and so we do need to move on. Let me ask just one last question.

Let me say to you again, Mr. Secretary, we really appreciate your coming. I think we have made significant improvements at both ends of Pennsylvania Avenue on the process of oversight, and the process of policymaking. When people ask me what I think we are doing most importantly in the Intelligence Committee, I talk about the fact that we have made oversight more systematic. I think that is what Congress doesn't always do too well. We legislate and the news media focuses on what legislation we have passed. But in this area the greatest contribution that we can make is to have systematic oversight. We can have all the oversight rules on the books in the world and if we conduct our own oversight in a hit-or-miss fashion, it doesn't work. I think the fact that both in the National Security Council and in this committee we have set up a comprehensive regular quarterly review of all Findings and covert actions in force. We have at both ends systematically and carefully examined the budget and use of funds for these projects. It is the systematic process which we are trying to do in a very orderly fashion, I think, that has greatly increased accountability in the process. And that is something we have worked on together. We have developed parallel structures between the National Security Council and this committee that are very helpful.

I do want to ask you this. Let us suppose—setting aside for a moment the differences between this bill and the NSDD, which you have given us in an unclassified version—I asked Mr. Cooper, did the Justice Department have any inherent objection to legislation in this area and he said not inherent opposition to legislation. Let's take the hypothetical because we do have a concern that we might have a good agreed upon process. I do think the NSDD goes a long way in the right direction, but the next President might totally change it, might decide to throw it out the window. We might again have different kinds of personnel involved. Senator Murkowski said earlier he had to, and I think he was referring to the past, be concerned about asking the right question. Let me say with Judge Webster, with yourself, with our relationship with General Powell, with Deputy Director Gates and others who come before this committee during the time this Senator has been Chairman, I feel we have had a very candid situation. We haven't had to worry about asking the right question. We have kept confidential those things that had to be kept confidential and we have developed, I think, an unusually high degree of candor and the two way conversations have been very good.

But, let us say, if we were to take the formulation of the NSDD and to legislate that, in essence, in place of the current law, how would you feel about that? I ask you that just as a hypothetical.

Secretary **Carlucci**. Well, as you read through the NSDD, you will find that it is very detailed, including specifying which interagency groups will work on which problem.

Chairman **Boren**. Of course, you wouldn't go into that kind of detail.

Secretary **Carlucci**. So it gets into internal management processing. As I said earlier, somewhere we have got to draw the line between oversight legislation and internal management. With regard to the concern that you expressed about future Presidents throwing the NSDD out, you always have the option of passing legislation at that time enshrining the NSDD and I would be glad to come up and testify on behalf of that legislation.

Senator **Cohen**. How would we know if they threw it out?

Secretary **Carlucci**. An arrangement has been set up where the oversight committees can be briefed on the——

Senator **Cohen**. Can be?

Secretary **Carlucci**. Well, they are being briefed.

Chairman **Boren**. I am convinced we are now.

Secretary **Carlucci**. Senator Cohen, if you are saying that you have to have absolute and total unrestricted knowledge into every President's internal management processes, that is just an impossible order.

Senator **Cohen**. Mr. Secretary, no one on this committee is asking for that. And as a matter of fact, I didn't even ask for the NSDD to be declassified. That is something the Administration did unbeknownst to me today. So when—I was sort of amused that Senator Boren is saying, would you have any objection if we used this document as part of the statute, you said, well, that gets into internal factors, well, I didn't ask you to declassify that. We've kept that confidential, our access to it. And I don't think it helps to say that we want total access to the interworkings of the Administration. We don't want that at all. What we simply want to know is when a covert activity is initiated. We would like to know about it within a real—a timely time frame, and that means 48 hours as far as we are concerned. That really is the matter of constitutional debate, which you yourself I think indicated.

Senator **Hecht**. He's been around you lawyers more than I have; that is the difference.

Chairman **Boren**. Thank you very much, Mr. Secretary, for being with us and taking your time.

Secretary **Carlucci**. Thank you Mr. Chairman, I appreciate it.

Chairman **Boren**. The Chair is going to impose a 5 minute rule on rounds of questions as we begin the testimony of the next witness, Mr. Clark Clifford. Mr. Clifford, we welcome you to the witness table at this time. We will, after the introductory statement of Mr. Clifford, recognize members and have 5 minute rounds of questions and repeat those 5 minute rounds. But we are going to try and stay with that in an effort to keep the hearing on some reasonable schedule.

Mr. Clifford let me say we are especially privileged to have you with us this morning. We appreciate your taking time to be with us. The experience which you bring to our deliberations is very valuable to us, indeed. Your background of service as Secretary of Defense in the Johnson administration, a key advisor to several Presidents of the United States, and also of course, as staff counsel to President Truman during the period of the enactment of the National Security Act of 1947 which led to the creation of the system of the National Security Council and the Central Intelligence Agency as we now know it.

I think one of the shortcomings that we have in Congress all too often is attempting to legislate in a vacuum. It's a problem that afflicts all of our institutions of government, that we don't often enough reflect on the perspective that experience and the history of organizations and their evolution could give us as we legislate. I think that the perspective which you bring to us this morning is especially valuable to us and especially appreciated by the members of this committee. We would welcome your opening statement and any opening remarks you might like to make at this time.

Mr. CLIFFORD. Thank you. Did I understand the Chairman to say that he was arranging for a 5 minute recess?

Chairman BOREN. No limitation upon you. I was indicating to the Members of the Committee that when they start to ask questions of you, I was going to recognize them for 5 minutes each in rotation. But we want you to please feel free to share your thoughts with us with no restriction on time. We just appreciate your being here and we would value your insights and thoughts very, very much.

STATEMENT OF HON. CLARK CLIFFORD, FORMER SECRETARY OF DEFENSE

Mr. CLIFFORD. Thank you Mr. Chairman.

I have a short statement, and with your permission, I will read it for I have deep convictions on the subject. It is a subject with which some of us have dealt for over 40 years and this particular emergency now brings into focus the need for the attention that this committee is giving to this subject.

I am pleased to appear before you today to offer my views on the subject of covert activities, and in particular your current efforts to improve the procedures by which such activities are approved by the President and made known to the Congress. This is a subject of great significance to our nation's foreign policy and our system of government. It is also, as we have recently seen, a subject of serious potential abuse. Therefore, the efforts of the committee are both timely and vital.

In the last year or so, we have witnessed the recurrence of an all too frequent problem: covert activities that get out of control, embarrass the nation and undermine our credibility and our capability to exercise world leadership. Moreover, this problem is getting worse, the cost are getting higher, and the damage is getting greater. For this reason, I say that, unless we can control covert activities once and for all, we may wish to abandon them.

While pleased to be with you today, I must confess to some frustration—not at the committee's efforts, but at the recurring need for such efforts. I can recall some 12 years ago testifying before the Select Committee to study government operations with respect to intelligence activities—the Church Committee—regarding the gross abuse in covert activities that were the concern of that committee. In my testimony in 1975—that's 12 years ago—I said:

"The lack of proper controls has resulted in a freewheeling course of conduct on the part of persons within the intelligence community that has led to spectacular failures and much unfortunate publicity. A new approach is obviously needed, for it is unthinkable that we can continue to commit the egregious errors that have caused such consternation to our friends and such delight to our enemies."

I could be making that same statement today. The Church Committee helped enact the 1980 Intelligence Oversight Act, and this certainly was a step forward. But today, we know that it was not enough. Sadly, my words from 1975 are all too pertinent today.

My recollection also goes back 14 years before the Church Committee came into existence. In 1961, after the attempted invasion of Cuba at the Bay of Pigs, President Kennedy re-constituted the Foreign Intelligence Advisory Board—on which I then served for 7 years—in order to study the severe breakdown in intelligence gathering and decisionmaking that led to that activity, and in order to recommend measures to avoid its repetition. It is my opinion that the so-called Iran-Contra affair was more damaging to the nation's credibility and leadership even than the Bay of Pigs incident.

Indeed my recollection goes back 16 years before the Bay of Pigs incident, when President Truman asked me to study the idea of establishing a peacetime intelligence agency. This led to the enactment of the National Security Act in 1947. Since that time, we have seen an egregious deviation from the original conception of how that act was supposed to function.

Covert activities have become numerous and widespread, practically constituting a routine component of our foreign policy. And with these activities have come repeated instances of embarassing failure—where the goals of the operations themselves were not fulfilled and unforeseen setbacks occurred instead. I believe that on balance covert activites have harmed this country more than they have helped us. Certainly efforts to control these activities, to keep them within their intended scope and purpose, have failed. For this reason, the work of this committee is essential.

We have reached the point now where we must reassess the very idea of conducting covert activities. If we are to continue with them and gain any benefit from them, we must find a way to keep them consistent with the principles and institutions of the Constitution and our foreign policy. If we determine that this cannot be done, then again I say we are better off without covert activities entirely than with them out of control.

In 1946, those of us assigned the task of drafting the National Security Act were dealing with a new subject. This Nation had not had a peacetime intelligence capability and had not regularly conducted covert activities. Soviet aggression in Europe and elsewhere at that time caused sufficient concern to justify new and bold actions. But at the same time there was concern that our Nation not resort to the tactics of our enemies in our effort to resist them.

In preparing the National Security Act, we thus proceeded cautiously, sensitive to the experimental and risky nature of the enterprise on which we embarked. Accordingly, it was decided that the Act should contain a carefully-worded "catch-all" clause to provide for unforeseen contingencies. Section 102(d)(5) provides that the CIA shall:

"Perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct."

The "other functions" that the CIA was to perform were not specified, but we did expect at that time that they would include covert activities. These activities were intended to be separate and distinct from the normal activities of the CIA, and they were intended to be restricted in scope and purpose. The catch-all clause was crafted to contain significant limiting language: "affecting the national security."

As the committee knows, the National Security Act of 1947 and its catch-all clause remain the only statutory authorization for covert activities. Moreover, the legislation that you are considering does not propose to alter the limiting language of the catch-all phrase, but rather aims to enforce it better.

On this score, it bears emphasizing that it was by act of Congress that the CIA was established and exists today; it was by act of Congress that covert activities were authorized and continue to occur. This is so because our Constitution confers on Congress the power to make the laws, and the President is charged with taking care that the laws are faithfully executed according to the intent of Congress.

In my judgment, the Constitution clearly provides to the Congress an important role in foreign policy, and this role includes the process of overseeing covert activities. It is part of the system of checks and balances among the separate branches of government. And we should remember that the oversight process does not give the Congress a veto, but only a voice.

Over the last year or so, the cost that covert activities can inflict on our system of government has been clear. Whatever the specific actions or individual responsibility, the sale of arms to Iran and the diversion of profits from those sales to the Contras in Nicaragua caused severe damage to our country and the institution of the Presidency. The President's credibility suffered drastically, and with it the integrity of the nation's foreign policy.

One of the principal shortcomings of the Iran-Contra affair was the failure of the President to notify the Intelligence Committees of the government's activities. The oversight process could have served a significant, salutary purpose: giving the President the benefit of the wisdom of those who are not beholden to him, but beholden like him directly to the people, and prepared to speak frankly to him based on their wide, varied experience. Had the President taken advantage of notifying Congress, he and the country may well have avoided tremendous embarrassment and loss of credibility.

The Iran-Contra affair presents this committee and the country with a crucial question: should the laws governing covert activities be changed.

To answer this question, we first might examine the attitude of President Reagan. In his letter to the committee of August 7, 1987, the President said that the current laws are adequate and that any changes could occur by executive order. I strongly disagree.

In the Iran-Contra affair, the President displayed an attitude that is antithetical to the oversight process. You will recall that the President signed a Finding that explicitly instructed the Director of the CIA not to notify the Congress of the activity. For 10 months, the Director and others involved abided by this instruction. In fact, the President finally notified the Congress only after the activity had become public knowledge. Much later, after the Congress had begun its inquiry, the President in his letter to this committee supported the concept of notifying the Intelligence Committees but insisted upon two exceptions. These exceptions would relieve the President of the notification requirement in "cases of extreme emergency," and "exceptional circumstances." To permit these two exceptions would make any notification requirement meaningless.

Further evidence of the Administration's attitude is the Justice Department's December, 1986 memorandum supporting the President's position in delaying notification for 10 months. The memorandum offered the novel theory that the President may determine what is timely notice based on the sensitivity of the covert activity. According to this theory, the President would never have to inform Congress of a particularly sensitive activity. This theory clearly would undermine the whole concept of the duty of the President to keep the Congress informed.

Moreover, we find that this continues to be the legal theory of the Justice Department. Last week in testimony before this committee, a Department representative made the following statement, and I quote: "There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this presidential authority is protected by the Constitution, and that by purporting to oblige the President under any and all circumstances, to notify Congress of a covert action within a fixed period of time, S. 1721 infringes on this Constitutional prerogative of the President." Just last week that opinion came from the Justice Department.

In other words, it is the attitude of the Administration that, whatever laws exist, the President may interpret them as he chooses. This is not the way that I understand our Constitution is supposed to work. The President's attitude must not prevail, in my opinion, or else recent misfortunes may well recur. So, my answer to the question confronting us today is that the laws governing the oversight process must be changed. And the changes must be specific, direct, and without exception.

I wish to lend my full support to S. 1721, the Cohen-Boren bill. This bill meets the need for change that exists in the important area of notification to the Congress. The bill would require the

President to sign a written Finding, setting forth the particulars of a covert activity, within 48-hours of approving it. The bill would require the President to provide the Intelligence Committees with the Finding within the same period of time, and while the President could limit notification to the so-called group of eight, he would have to explain why he was doing so. The President would also be required to give notice of any significant changes in any covert activity. Finally, the bill would prohibit Findings that were inconsistent with U.S. law or purported to be retroactive.

These are all welcome and worthwhile changes in the oversight process. In my view, however, they are not enough. Tightening of the procedures will do some good, but past efforts of the Church Committee and others have demonstrated that we need to do more. In order to be effective, the new legislation should also contain sanctions that would penalize any failure to notify the Congress within the statutory period.

Therefore, I would like to propose for the committee's consideration a provision to be added to S. 1721 that would automatically terminate and prohibit the expenditure of funds for any covert activity with respect to which the President had failed to follow the oversight process. This provision would go beyond the ban on funding of unauthorized activities in the Cohen-Boren bill, because it would require the President, within the statutory period, to notify the Intelligence Committees, as well as sign a Finding. Furthermore, according to my proposal, any government officer or employee who knowingly and willfully violated or conspired to violate the prohibition against the expenditure of funds for such a covert activity would face criminal penalties.

In my view, there is no excuse for failure to notify the Congress according to the law, and there should be no exception to the sanction against violating such law. The purpose of this legislation is not to assume good faith but to ensure good government.

For many years the United States has offered leadership to the world because of its character as a nation and its devotion to freedom and the liberty of man.

We have great economic power.

We have unparalleled military power. But our standing in the world community rests mainly upon the confidence and trust that other nations have in us.

We do not hold the free world together at gunpoint. It is mutual trust that binds us. And the vital element of that trust is our credibility.

Unfortunately, our credibility has been grievously damaged this past year in many parts of the world.

It is incumbent upon all who are in positions of authority to take the necessary steps toward restoring our former position. This legislation is a splendid move in this direction, and will be of vital importance in reducing the possibility of another similar disaster. I thank you.

Chairman **Boren**. Thank you very much, Mr. Clifford, for a very thoughtful presentation which you made to the committee. I know all the members value the thoughts that you shared with us.

I first want to turn to the distinguished Chairman of the Finance Committee, who is chairing a part of the ongoing Conference on

Reconciliation—a conference from which I have been absenting myself this morning to be in these hearings. I didn't worry about absenting myself as long as the distinguished Chairman was there to make sure things were done right. So, I want to make sure that he can return to those deliberations as quickly as possible, and I know the other members will be agreeable if I call upon Senator Bentsen first for his comments and any questions so he can return to those deliberations. Senator Bentsen.

Senator **Bentsen**. I thank the distinguished Chairman for his comments. Let me state first that I have known this man for thirty-nine years, ever since I first came to the Congress. I don't know of anyone who has had a more continuing, profound influence for such an extended period of time as Clark Clifford has. I see his lovely wife seated back there. I'm glad to see her here, too. As a citizen, I am most appreciative of his contributions.

You made a rather major statement when you said that you thought that perhaps this country had been more damaged by covert actions than it had been benefited in the past. That's a pretty tough statement. I would assume from what you've stated though that you're not against any covert actions so long as it has proper oversight and coordination between the two branches of government. Would you comment on that?

Mr. **Clifford**. There's a great tendency to confuse ordinary intelligence activities and covert activities. I would estimate as a guess that covert activities may constitute 2 or 3 percent of our activities whereas intelligence activities run 97 or 98 percent. As you look back over the checkered history of covert activities, you run into the Bay of Pigs. Many of you will remember the Bay of Pigs. That was a covert activity that went wrong greatly to the embarrassment of our country. Some of you may remember a series of events that came in under the code name of Operation Mongoose. Those were efforts that were made over a period of time to assassinate Castro, and it broke and got into the papers and embarrassed us all over the world. Some of you will remember the embarrassment with reference to our activities in Chile, and Mr. Allende. These are all actions that went wrong. I concede that sometimes one of them may go right, and you may not know about it. But, during my long years of close association with the Intelligence Community, there are not very many of them that had been worth trying. The danger of embarrassment is such that it must be regulated so carefully.

My own attitude is that if a question comes up about a covert activity, unless it's very clear that there's a good chance of bringing it off, that it can be done reasonably promptly, and that it can be done in complete confidentiality, if there's any substantial doubt about it, I say abandon it. We get along very well without this covert field. It's so limited, but so subject to danger.

I think many of you know the degree of embarrassment that our country sustained in this past year and a half. If you have friends abroad, they write. I get letters from them. What in the world has happened to the United States? You state as a public policy that you won't deal with terrorist nations and all the time you're sending money to Iran to get the return of hostages. We have one letter that said, it looks to me like America has lost its way. And it wasn't an isolated instance like the Bay of Pigs. It went on for 18 months. And I guess it would be going on today had there not been the publishing of this conspiracy in some magazine that was published in Beirut.

Senator BENTSEN. Well, I would say, Mr. Clifford, that I think one of the main bones of contention here is the question of what is timeliness. If you examine the debate in 1980 on this subject, the Congress felt very strongly that they should be informed of such action in a very short period of time. Certainly, from my point of view, nothing like what we saw in the delay in the Iran-Contra situation of some 10 months, with the serious question of whether we would have known then if we hadn't had the leak in the Lebanese periodical. So, I strongly support the position of the bill with the short period of time for notification.

But, let me ask you about other measures that Senator Specter has proposed. He proposes establishing a statutory Inspector General for the CIA and proposing a mandatory jail term for government officials who lie to the Congress in the process of the intelligence work with the CIA. How do you feel about a statutory Inspector General for the CIA?

Mr. CLIFFORD. I would be opposed to that.

Senator BENTSEN. Now tell me why.

Mr. CLIFFORD. I think it's not needed. It places another layer in the Intelligence Community. If you have an Inspector General, you have to have a substantial staff if it's to be worth its effort. You appoint an Inspector General. It's done by the President—very likely, almost invariably, with the consent of the Director of Central Intelligence. I don't believe it provides us with the check that we might think that it would. I think that the whole area of intelligence should be guarded as much as possible from routine treatment. The Inspector General performs reasonably well in the Defense Department—not nearly so well as one would hope that he might perform. That's different. In the Intelligence Community, and in the Director of Central Intelligence, I doubt that the benefit would be equal to the additional risk that results from putting another layer into the intelligence department.

Senator BENTSEN. I see that my time has expired. Thank you very much, Mr. Chairman. I have to get on back.

Chairman BOREN. Thank you very much, Senator Bentsen. We appreciate your taking the time to come.

Let me pursue the last part of Senator Bentsen's question. Senator Specter has also advocated—we've had discussion, in fact, before this committee on this matter—that we should provide a mandatory criminal penalty for willful mis-statements by witnesses to congressional committees. So that if we had someone, let's say from the CIA, that came before our committee and willfully gave a misstatement that there would be a mandatory—mandatory—criminal penalty assessed. It also provides that that witness may change his statement if he finds he's inadvertently made a misstatement or that there's a sort of cooling off period of 4 or 5 days to let the witness have the right to come back and alter his testimony. How yould you feel about that proposal?

Mr. CLIFFORD. I would be opposed to that.

Chairman BOREN. Why would you be opposed?

Mr. CLIFFORD. The reason I would be opposed to it is, first, I think that the laws on the statute books on perjury today are adequate. They're far-reaching. They're effective. Second, there is a general attitude in the law against compulsory terms of punishment under our criminal law that prevent you from giving any consideration to the particular circumstances that exist in any case. Also, I would disagree with the suggestion made in that offering that if a man comes in, perjures himself before the committee, but then has a change of heart within 5 days, that he can come in and completely purge himself of the perjury. I consider that inappropriate under these circumstances. It might be that he would have come in and perjured himself and for 4 days got away with it. And then there might be a piece in the paper suggesting that he might not have told the complete truth. He would hasten before the committee the next morning and purge himself of the offense. I consider it ineffectual and not helpful to us.

Chairman BOREN. You participated in many, many discussions in your time of government service, both in an official capacity and as an unofficial adviser, in terms of the candor of discussion. Obviously, this committee in closed session often has the representatives of the Intelligence Community before us. We have questions back and forth about our policy, about their intelligence assessments. How do you feel about whether or not those people routinely should be put under oath when they testify before the committee? Do you think that would help in terms of increasing candor, or do you think it might inhibit discussion?

Mr. CLIFFORD. If you're going to deal with individuals in the Intelligence Community, if for any reason you do not have confidence in them, then I don't believe you ought to take your time in calling them. If you have confidence in them, and you get to know them after a while, I would call them, and in the absence of information to the contrary, you're very likely perfectly able to accept what they say. I think that it complicates and retards the process of reporting if you're going to have a requirement that everybody be put under oath. That isn't the way our government works. Our government works supposedly between people of good will who are attempting to work toward a common end—that is the welfare of our Nation. So, I would not surround that with inhibiting factors of that kind.

Chairman BOREN. I appreciate your comment. I couldn't agree with it more strongly. I think you're absolutely right.

I have one chance for one last question since I am going to impose the 5 minute rule upon myself.

Let me ask a hypothetical, to be devil's advocate for a minute, about our own legislation. The President must notify at the very minimum under this proposal the group of eight, the four congressional leaders plus the chairman and vice chairman of the 2 committees, within 48-hours.

Let's assume that you do have some highly sensitive operation like the Canadian Embassy kind of operation. Let's suppose that the President, for some reason, thinks that a particular Member of Congress might have such a strong philosophical objection that he would just feel morally compelled to make a public statement about this matter, or perhaps that Member of Congress has a reputation for, unintentionally perhaps, being too talkative and careless with information.

What would you do if you were advising the President of the United States and you had a basis for believing that one or two Members out of this group of eight really might increase the chances of disclosure of some operation like the Embassy operation, let's say, where lives might be at stake.

How would you advise the President in that situation? How would you deal with it or should we deal with it legislatively?

Mr. **Clifford**. In the first place, I would have hoped that when the President gained that opinion of that particular member of the Congress, that he would have taken steps with other members of the committee to have worked out that plan and avoided that particular difficulty. So that when some emergency comes, he would already have taken care of that.

I think the President cannot operate very well in the context of feeling that there are one or more members of the group of eight who are likely to leak confidential matters.

So, I'm assuming that if he learns that, he very likely would cure that situation before the emergency came up.

But even if he hasn't cured it, I feel so strongly about this exceedingly narrow line of covert activities—let's call it two percent of our intelligence activities—I believe I could confine my efforts to working out additional intelligence information until I was able to get the word to the group of eight. And maybe I could get it to the group of eight in such a manner that they would all be together and not be contacted separately so that there would be much less likelihood—if they were all notified together where there's the pressure of the other 7 members—that you would get a leak under those circumstances.

I feel so strongly, my convictions are so deep that you cannot have exceptions, that I would go ahead and take the chance of something occurring. As soon as you get to exceptions, I think you ruin the validity of the notification process.

Chairman **Boren**. I appreciate your comments. Let me say also I agree with your comment about the kind of peer pressure that can work. We've seen that on this committee as we've endeavored to establish the credibility of this committee as capable of safeguarding sensitive information.

The fifteen members of this committee have become the enforcers themselves and there has been very strong peer pressure. The feeling is that, if we're going to restore the kind of relationship of trust between the institutions that we must have, we ourselves have to demonstrate that kind of integrity in the committee. The members themselves, have been so strong in their feeling; that is the real enforcement mechanism now on this committee.

Senator Cohen?

Senator **Cohen**. Thank you, Mr. Chairman. Mr. Clifford, I apologize to you for quoting your statement in advance, but there were certain segments that I could not resist focusing upon because I think you provided very, very important insight into what we are discussing.

As I look at you, I think of Justice Oliver Wendell Holmes comment, that we look to the past not out of desire, but out of necessity. And I think it is important that we look to the past to someone like yourself who has stood astride of decades of involvement with various Administrations. And that's something I think we tend to lose focus of on this committee. At this time, we are only dealing with this Administration. If I had simply to rely upon the judgments of those in power now, I would have no difficulty. We have had a very good relationship with Defense Secretary Carlucci. And General Powell. Director Webster. Howard Baker. These are all individuals in whose judgment I would feel comfortable in placing total confidence. But we're not legislating or considering legislation simply for this Administration. We're considering for future ones as well. And times may change. And people change. And policies can be changed. And NSDD directives can be changed without restriction. So there is a need to look at it from a much broader perspective. And I think that you provide that.

I would also add one other thing about covert actions and appreciating and identifying with what you were saying. That is, with respect to a covert activity, the President has made it clear in terms of his attitude—and you've talked about the President's attitude—the President made it clear that his attitude toward covert activity is such that he would never authorize the initiation of a covert activity unless he was satisfied that if it were disclosed at some future time, that he or anyone in his Administration could stand behind that covert activity and acknowledge that, in fact, he initiated it and set it in motion.

Indeed, that is either a very significant change in attitude or at least clarification of attitude on the President's part. I think it is entirely appropriate that when we undertake covert activities, we understand that we do run the risk of having it disclosed, and that we can stand behind what we were trying to achieve. And the President has stated that publicly on several occasions.

Also, with respect to foreign policy, just a word about that. Foreign policy is ordinarily openly debated in the Foreign Relations Committee, the Foreign Affairs Committee, and there is an opportunity to have an expression of conflicting views and philosophies and judgment. And what ultimately comes out of that foreign policy debate is hopefully a distillation of those conflicting views which reflect ultimately a majority viewpoint, either in support or in opposition to the President of the United States. And if there's one thing we've learned over the years, it is that no foreign policy is going to be successful if it doesn't have the support of a majority, a solid majority of the Members of Congress ultimately reflecting a majority of the people of this country. And that's why we have foreign policy that is so openly and vigorously debated.

When we go into a covert activity, a covert action, covert policies, then we are engaging in the very antithesis of that free and open exchange of views which would normally provide that distillation of consensus. And if we are going to use covert actions, it seems to me at the very least we can insist that Congress be notified in some fashion—I would hope that in almost all of the occasions this would be prior notice. It has been the practice of this Administration. The practice has been prior notice. We have an opportunity to give the President the benefit of our views as you so eloquently stated in your paper. That we are not beholden to him. We are beholden to the same public that he himself is beholden to. We give him the benefit of our views prior to the initiation of the action, not after. Recognizing there might be extraordinary circumstances, we are entitled and demand to be notified in a timely fashion. And that doesn't mean 10 months. And it doesn't mean 6 months or 10 days. It means as soon as possible, and we define that as being within a 48-hour period.

And that is the purpose, to make sure that Congress does not lose—we lose our vote perhaps. We don't have a chance to vote on covert action. But we don't want to lose our voice, again, as you expressed it so well.

Final comment, Mr. Chairman. Nothing we can do on this committee can prevent future mishaps or misjudgments or abuses. There is no legislative remedy to the mistakes of mankind. And we can't erect any barriers against mistakes or abuses. We can't legislate or weave a web of regulations that will insulate people against the temptation to abuse power in the future or make mistakes. All we can hope to do is to provide greater definition in a process that ensures the opportunity for Members of Congress to reflect their viewpoints in a foreign policy objective.

And I simply want to thank you, Mr. Clifford, for the very powerful statement you made today in support of the legislation.

Mr. CLIFFORD. Thank you, sir.

Chairman BOREN. Thank you, Senator Cohen.

Senator Hecht?

Senator HECHT. Thank you, Mr. Chairman. It's a pleasure to be before you today. I've heard and read about you for many, many years.

I found your statement on covert activities on the bottom of page 1, we may wish to abandon them. When the CIA was formed in the late 1940's, it was determined that we had the information to stop a Pearl Harbor but no one could put it all together. As I mentioned before we had the luxury of 2 oceans. Now, we are in a different world. Let's say hypothetically, we have information about a terrorist group that has an atom bomb. If we dismantle all of our apparatus for covert activities, we cannot move on a moment's notice to get that terrorist. Do you agree on that?

Mr. CLIFFORD. I think that, Senator, if I might say so, I think you are combining ordinary intelligence activities with covert activities. Most of our intelligence activities are conducted clandestinely. They are in secret. We get all of the information in together, we examine it, we do a great deal that's going on all the time under the surface. But those are not covert activities.

You're suggestion is a correct one. It was President Truman who said that if we had one depository in our country, for all of the evidence we had prior to Pearl Harbor, we could have predicted Pearl Harbor. If we had the words from the State Department, from Joe Greios' cables that came in, if we had information from the Commerce Department about the enormous amount of scrap iron that the Japanese were buying, we'd had other indications about their attitude toward the oil embargo. We would have learned about them. None of that has anything to do with covert activities at all. That's straight intelligence.

Covert activities are those instances in which we are conducting some secret and usually political activity with reference to some other country under a basis that in the event the story ultimately should come out, the President and other top officials can deny that they knew anything about it.

Senator **HECHT**. How would you classify Afghanistan? Our involvement in Afghanistan?

Mr. **CLIFFORD**. Our involvement in Afghanistan may have started as a covert activity. It didn't last very long as a covert activity. We are now openly, publicly and enthusiastically sending arms to Afghanistan, and have been for months and months and everybody knows it. As soon as an activity of that kind becomes overt instead of covert, it leaves the old category and no longer comes under that heading.

Senator **HECHT**. I fully understand that but there has to be a beginning. And as you so aptly stated, it began as a covert activity. And it has been a tremendous, tremendous success because of the first time we have tied down Russia.

Mr. **CLIFFORD**. But it wasn't a success, Senator, because it was a covert activity. It started as a covert activity. It couldn't have lasted very long because too many people knew about it. The Pakistanis knew about it. The Afghanis knew about it. And soon it was public. So the overt activity started.

I would say to you that during that short period in which we were secretly sending some arms I would say that was a modified success. It didn't do very much over there and we still haven't done very much. But at least we made the effort. But after a while, we were making it publicly.

Senator **HECHT**. Well, let's talk about Nicaragua. Our covert activities in Nicaragua.

Mr. **CLIFFORD**. Yes. Our covert activities in Nicaragua I think should be generally condemned. I was deeply embarrassed when I learned that our CIA was engaged in mining the waters off of Nicaragua. I consider that a terrorist activity. It put us into an impossible position with our allies. They had ships in international waters and those ships would strike our mines that we had used there.

When Nicaragua went to the World Court and complained about our activities, we then said we wouldn't be bound by the decision and the World Court ruled unanimously against us that we had engaged in international lawlessness. That was a deeply embarrassing experience for all of us in this country.

So I think that we can go ahead with what we are doing in Nicaragua if people believe we should be doing it. I think we should not. I don't think our national security is involved in Nicaragua. I think what we ought to be doing in Nicaragua is helping them with their economic problems. I don't believe Nicaragua is a Soviet base.

If they moved anything into Nicaragua that we didn't like and that constituted a threat, we could wipe it out in 10 minutes. We are enormously strong. There's nothing in Nicaragua today in my opinion that threatens the United States.

So the question again of these activities is that, if we were engaging in some covert activities in Nicaragua in the early stage, that has, I think, probably stopped. And we're probably now engaging in open activity. When somebody by the name of Mr. Hasenfus or something flew a plane down, that might be considered covert activities. But has it been successful? I don't believe it has.

Senator Hecht. Let me just take one minute and capsule the crux of the philosophy of what we are talking about today.

In the past 2 or 3 days, there have been revelations about Nicaragua. Ortega and his brother talking about a 600,000 man militia. Now these are not agrarian farmers. We have satellite photography of Russia sending arms to Nicaragua. So are we going now to continue with a different philosophy. In 1948 when we had the Berlin airlift and refused to go on. The Korean War, where we refused to push ahead. Are we going to go into a conflict with an enemy with our hands tied behind us. Or are we going to have a different standard than our enemy? And I think this is the crux of this whole legislation today.

We cannot abide by one set of rules and our enemies abide by another set of rules. And I thoroughly disagree with you on your statement on Nicaragua.

Mr. Clifford. That makes it nice that we have a free country.

Senator Hecht. Yes it does.

Mr. Clifford. The point that you are making about Nicaragua is an interesting one and I look forward sometime to discussing it with you in private.

But you will recoginze that it does not involve any longer the question of covert activity. Our actions have become overt there. The debate is, should we send arms. Should we send military personnel ultimately. Should we send other kinds of aid. So it has moved into the public domain and I think out of the covert field.

Senator Cohen. Mr. Clifford, if there were any consideration that was still a covert action, the members who have even mentioned that subject here today would be in violation of the committee rules.

Chairman Boren. Senator Warner?

Senator Warner. Why thank you, Mr. Chairman.

Mr. Chairman, has our distinguished witness been given the opportunity to introduce the lady who accompanies him today to this hearing? Would you care to do so?

Mr. Clifford. I thank you very much. Mrs. Clifford, who has worked with me and counseled with me for 56 years has followed the practice of occasionally coming to interesting matters of this kind, and as a result I value her opinion very highly. And I know you are all pleased to have her here.

Senator Warner. We welcome Mrs. Clifford here today.

Chairman Boren. We do.

Mr. Clifford. Thank you.

Senator Cohen. And we will not censor that role or relationship as they do in the Soviet Union.

Senator Warner. Mr. Clifford, I think on Page 6 if I can paraphrase the statement, that it really captures the essence of what we are trying to do here today.

You say here such oversight gives the President of the United States the benefit of the wisdom of those who are not beholden to him, but beholden like him directly to the people of the United

States and who are prepared to speak frankly to him based on their wide, varied experience.

And we are dealing of course in the essence of the 48-hour rule and the informing of the eight senior members of both Houses. And you know, to me that's a very laudatory goal. And if I can find a way to support it, I hope to do so. But I as yet have not found that way.

So I want to go back and ask you, a man whom I have been privileged to know as a friend for many years and one who has a corporate knowledge of the Executive branch second to none, given this goal, why have we waited now until 1987 to address it? We passed the National Security Act in 1947, some forty year ago. A series of Presidents, indeed, both Republican and Democrat, have been faced with this issue of covert action and yet it's been forty years and we haven't done it.

What has transpired to compel us today to take a step as recommended in the bill which in the judgment of myself and others is a very substantial invasion into this constitutional right of a President to have the conduct of the foreign affairs as his prime responsibility? What has occurred in this intervening period to compel us here today some forty years later?

Mr. Clifford. We are in an area in our country that is brought about by our system. If George the Third were still in control of the country, we wouldn't have this problem. [General laughter.]

Senator Warner. We'd have others, but anyway.

Mr. Clifford. We'd have other problems, but we wouldn't have this problem, because he would make all the decisions.

Now, after our forefathers got pretty tired of that, they said we're going to construct a new government, and we're going to construct a government of checks and balances, and we're going to construct three separate divisions—legislative, executive and judicial—and each shall constitute a check upon the other. It has worked remarkably well. So, in the area in which the legislature moves, the President, if he chooses, might veto. They then can overrule the veto. And then that becomes the law. Then you go to the Judicial Branch. The Judicial Branch may say it is unconstitutional. Delicate areas like managing intelligence—sensitive and confidential matters—emphasize the narrow line between the Executive and the Legislative Branches in which they work together in most instances but then they have a difference of opinion in some instances. And that's been the circumstance for forty years. Presidents don't want the legislative body to interfere with their discretion in this very delicate field.

Senator Warner. And that's been consistent, both Democrat and Republican, because you've known them all well.

Mr. Clifford. It's been consistent since the passage of the National Security Act in 1947. So they've come up and Presidents continue to insist that they should have the right under these emergencies and extraordinary circumstances to take extraordinary actions. The Congress has said, but, look where that has led us. Look at these national embarrassments that we've had come up every so often. We haven't found the answer. That's the best answer for your question, Senator Warner. We haven't found the answer. I have a deep and abiding hope that maybe you men are going to find the answer, because, as I said earlier, I'm saying exactly the same things today to this committee that I said to the Church Committee twelve years ago, and they wanted to solve it but they didn't because they weren't willing to go far enough.

Senator **Warner**. Mr. Clifford, in my one remaining minute, it seems to me that the world has changed substantially in these forty years and we, fortunately, remain a Nation under the rule of law. But we're now confronted with threats from terrorists, individual, organized, and in some cases state sponsored by other nations—none of whom observe any rule of law—and, yet, we're moving towards placing in this bill further tight restrictions on our President under the concept of the rule of law and the concept or checks and balances, when the world seems to be moving in the other direction—terrorism.

Mr. **Clifford**. I don't consider what we're doing as placing any improper restriction upon the President. If we're to have a system, Senator, of checks and balances, why do we have this dramatic exception of saying that a President without any consultation in a very delicate and important field can go off entirely on his own. If you read what the Justice Department says, they say the President has that right. I disagree heartily with that, because what we're doing here is we're not interfering improperly. We're saying to the President, when you decide upon a covert activity, come to us within forty-eight hours. Give it to us in writing as to what it is you're going to do, and it gives us a chance to talk with you about it. You get the combined judgment and wisdom of 8 men. We might want to come visit with you if we could talk it out with you. If we disagree with you, we might convince you not to go down this road. But the important part is that after you men have made your attitude known to the President, he has a right under our system to say, thank you, gentlemen, I disagree with you, and I'm going ahead with it this very minute.

Senator **Warner**. I hear you, and I'll conclude. I think the Iran-Contra thing was a tragedy for this country, and I concur in your observations and those of our two distinguished leaders here. But I don't want to see bad facts make bad law particularly in the light of at least forty years in which the system has worked by and well in the best interest of the country. That's my concern.

Chairman **Boren**. Senator Specter.

Senator **Specter**. Thank you, Mr. Chairman.

Mr. Clifford, I regret that I can not be here for all of your testimony because we're conducting in the Judiciary Committee the hearings as to Judge Kennedy, and I had to be present there. I'd like to question you about a couple of subjects which you've already testified to, as I understand it, on the Inspector General issue. The legislative proposal calling for an independent Inspector General is one which the select Committees recommend, and it's in a bill which I have put forward, and I understand that you have testified that you feel it would be an extra layer of bureaucracy without accomplishing a great deal. Before asking you a specific question, would you mind summarizing for me—I know this is repetitive—your objections to the independent Inspector General provision.

Mr. CLIFFORD. It is my feeling that the general institution of Inspector Generals has worked reasonably well. If an Inspector General is to operate effectively he has to have a staff; it has to be a good staff; it has to be a trained staff. And, my first objection is that it does add another layer to the operation.

Second, in circumstances of this kind, Senator, where you have the secrecy that exists within the CIA and the proper indisposition to spread that knowledge out among too many others, I'm not comfortable with bringing a whole new group of people in who are not intelligence trained and saying we're going to make them an inspecting operation of the Agency. I don't believe that it would function well, and I don't believe it would be effective.

In the third place, again in the intelligence field, because the President would appoint the Inspector general—and I'm assuming in almost every instance he would be appointed with the advice and consent of the Director of Central Intelligence—I don't believe you're going to get quite the product from that Inspector General that you would suppose that you would.

Senator SPECTER. Mr. Clifford, are you aware of the fact that there is an Inspector General now in the CIA?

Mr. CLIFFORD. Yes, and I've not ever noted that anything much came from it.

Senator SPECTER. Well, that's the problem. We saw his work on the Iran-Contra affair, and it was insufficient. There are some eighteen Inspectors General now appointed on an independent basis. The legislation which is proposed would give the CIA Director the authority to stop an investigation from going forward, but in that event, the information would have to be brought to the oversight committees to see what is going on. So that it is a layer of governmental activity which is in existence at the present time, and the thrust of the legislation is to provide sufficient independence so that if some impropriety is found, the official, the Inspector General, would have the freedom to act without fear of being fired since he's not subject to removal because of his independent status.

Mr. CLIFFORD. My experience would lead me to believe that it's not likely to prove to be effective. I believe that the oversight of the CIA should rest with this committee. I believe if you want to have better control, if you want to have better inspector generalship, do it from this committee. Don't set up an extra layer within the CIA. For instance, another suggestion is that the General Accounting Office be brought into the picture, and that the general Accounting Office conduct audits of the CIA financial matters. I would also oppose that.

Senator SPECTER. I'm opposed to that too, so we don't have to take any more time. I've only got a very brief period left. Let me move very quickly, and I appreciate your experience.

Chairman BOREN. I might say we've set up our own in-house auditing capability in this committee. We're in the process of doing exactly what you were saying.

Senator SPECTER. The other subject which I would like to discuss with you very briefly, Mr. Clifford, is the suggestion for a mandatory sentence, and I understand that you've already testified that existing laws ought to be enforced, and I quite agree with you. There is a special problem where false information is presented to the Intelligence Committee which operates in camera, secretly—necessarily so—because unlike a public hearing like this one, someone may see it on C-SPAN and make a comment correcting what a witness testifies to if it is a factual matter, and we do not have that opportunity on a secret session. And, it is not within our purview at the present time to do anything about the pending matters. That's going to be up to Independent Counsel to decide what prosecution should be brought under 18 United States Code, Section 1001, for false information.

But my own thinking is, based on being a prosecutor for some time, that a deterrent has a very profound effect, and it is very difficult to bring enough prosecution to deal with the problems which exists, and that a mandatory sentence on the books would have a great therapeutic effect, being directed toward very thoughtful and very knowledgeable people. And the bill provides for a 5-day period when the person can recant and avoid any of the implications of the criminal provision.

I'm not interested in sending people to jail who testify before this committee. I'm interested in getting the facts so the committee can perform its function. And when Judge Webster made some comments about the pending legislation, I didn't ask him about it specifically because I knew I'd get a negative answer. But, he had made a comment—I learned at least that much—he made a comment that the mandatory sentence would at least get the attention of the people who testified. And what I'm looking for is to really underscore the seriousness of the falsification before all committees, but especially the Intelligence Committee, to catch their attention and to try to get some deterrents in effect. And I'd be interested in your observations, and now I'll ask you a question. Do you think it would have a deterrent effect on the kind of thoughtful, knowledgeable people who appear before the Intelligence Committee?

Mr. CLIFFORD. I would doubt it, Senator. I think it's a move in the wrong direction. I think that we have a system of laws in this country that are generally applicable. And I believe we get into difficulties if we begin to search out—if we're going to have a separate law for these witnesses before this committee and may be some separate law for some other witnesses before other committees. Well presented cases under our prejury laws today can be made and are effective. So, I'm more comfortable with our having those general laws and bringing indictments or informations under those general laws.

The experience with having specific penalties put into the law has been rather unfortunate. If you have a 5 year sentence that is obligatory and someone commits a really quite minor mistake, that case comes before a jury and there's a mistake been made and the jury says, well, we're not going to find that fellow guilty and send him up for 5 years. You lose effective prosecutions under it. I think that's what the bar has found out through the years. So I generally oppose obligatory, set terms for punishment.

Last, as I had mentioned earlier in your absence, I think it probably unwise to have that 5 day purging period in which one can come in. Because I think it possibly permits one to try to get away with a perjured comment, and if anybody learns about it in the next 5 days, he can always come in and purge himself of the improper action. I think in that particular area, Senator, we have sufficient tools to meet the problem.

Senator **Specter**. Thank you very much, Mr. Clifford, Thank you, Mr. Chairman.

Chairman **Boren**. Thank you, Senator Specter. Again, Mr. Clifford, let me just express our appreciation for your taking the time to come and share with us the benefit of your experience. We appreciate your testimony today. We appreciate the service you've rendered to this country. And let me say that most of all we appreciate your example of public service because it challenges all of us to do our best to give back as much as we can possibly give to the broader community and to the national interest. Your example is a very important one to us and I know I speak for all the committee in expressing that appreciation to you. Thank you very much for being with us.

Mr. **Clifford**. You're very kind, Mr. Chairman, and I thank you.

Chairman **Boren**. Thank you.

Our next witness will be Mr. John McMahon, if he will come forward. Mr. McMahon of course is very well known by the members of this committee with over 30 years of service in the Central Intelligence Agency. He is a professional in that field with a great reputation not only for capability but for integrity as well; previously as Deputy Director for Operations and before that Deputy Director for Intelligence. Mr. McMahon, we appreciate very much your taking the time to come back and give us testimony in light of your own experience on this very, very important subject. We are glad to have you back, we have missed having the regular association with you that we had during the time that you were at the Agency, and we welcome you to the committee.

Mr. **McMahon**. Thank you Mr. Chairman.

Chairman **Boren**. We will receive your opening statement at this time if you wish to.

STATEMENT OF JOHN McMAHON FORMER DEPUTY DIRECTOR OF CENTRAL INTELLIGENCE

Mr. **McMahon**. Mr. Chairman, I do not have an opening statement. I have responded to the committee on the draft bills that you forwarded to me in writing and I think most of my letter can appear in the record, although there are parts of it that discretion would suggest be omitted from an unclassified version.

I would like to say before the questioning begins that I do appear here as an advocate of covert action. I think it is an essential part of our intelligence portfolio and that this Nation needs to have in its lexicon of capabilities the facility for covert action. I believe covert action has to be a subtle articulation, so to speak, of our foreign policy and therefore my appearance is based on the premise that yes, indeed, we will have covert action and that there is an oversight process that governs that. I will not speak to the constitutional issue between presidential prerogatives and congressional prerogatives; simply accept that as a given. And I'll be happy to respond to your questions.

Chairman Boren. Thank you very much, Mr. McMahon. I have one brief question on a related subject and I will turn to the other members of the committee. In addition to the procedures for monitoring oversight or providing for oversight such as the provisions on written Findings, on retroactive Findings, the 48 hour notice and the rest, the committee also has under consideration the proposal for an independent inspector general to also be provided for the CIA. What is your view of that proposal. Is that a wise proposal or an unwise proposal?

Mr. McMahon. I would not support such a provision Mr. Chairman. I think that the key to an inspector general process is to have that integral and very much a part of the management of the agency. And that can best be effected from within, from people who are experienced and knowledgeable in the intelligence profession and report to the director. The committee can look to the director to make sure that the CIA is governed according to the regulations and the law and that the intrusion or micro-management into the independent inspector general would cause that inspector to be viewed almost as an adversary within camp.

Chairman Boren. Do you think it would make it more difficult for him to have the access to the information that he would need?

Mr. McMahon. I think there would be great reluctance on the part of Agency employees to freely approach an inspector general with what they thought might be a problem.

Chairman Boren. Well, if you have the inspector general internally where it is known he has the support of the director—what you are really saying is that the committee in your opinion must put its faith not in the inspector general but in the director of the agency——

Mr. McMahon. That is correct.

Chairman Boren. And that the inspector general would be more effective in drawing out any necessary information if it is known internally that he has the backing and support of the director.

Mr. McMahon. The inspector general should function in the image and likeness of the director to impose his policies and make sure that they are carried out within the agency.

Chairman Boren. Senator Cohen.

Senator Cohen. Thank you. Mr. McMahon, welcome.

Mr. McMahon. Mr. Vice Chairman.

Senator Cohen. I would like to respond or at least ask you to respond to the suggestion that was made by Senator Warner earlier, saying that he felt that the Iran-Contra affair as such was a bad experience but he did not want to see a bad law made an exchange. I want to assure the Senator from Virginia that I don't intend to have bad law formulated that what we are seeking to do is provide some definition which will help the agency in our intelligence capability rather than hurt it——

Senator Warner. Mr. Chairman, you recognize there is nothing personal in that. I am just drawing on the old law school adage of bad facts, bad law and I didn't mean to draw a parallel.

Senator Cohen. I understand. I just want to assure the Senator that adage does not apply here.

And Mr. McMahon let me turn to you directly. What has been your experience in the field of covert actions? Are you aware of any case in which members of the committee have in fact disclosed covert activity to the detriment of the agency during your tenure there?

Mr. McMAHON. Not to my knowledge, Mr. Chairman, with this committee. When the public heat on Nicaragua began to unfold there was a great deal of discussion throughout Congress and there our activities rapidly became exposed. But I found that the committees, both the House and Senate, have been extremely responsible in how they have handled our intelligence information.

Senator COHEN. Are you aware of any case in which the Administration would be precluded or prevented from notifying Congress within 48 hours during your experience?

Mr. McMAHON. None that I am aware of, Mr. Chairman.

Senator COHEN. One thing is troubling to me. The notion is being raised now that there might be circumstances in which you could not notify eight members of Congress. Covert activity as I understand it involves a great deal of planning, analysis, calculation, weighing of pros and cons which all goes on before a covert activity is ever even proposed to any President. Isn't that true?

Mr. McMAHON. That is correct.

Senator COHEN. We are not talking about a matter of ipso facto, I see a problem and I've got to take action today. That is not how covert action is carried out in this country. I would hope not. But rather the Administration calls upon the Agency to make an analysis, to monitor the activities, to weigh the risks, to weigh the types of opportunities that would be there, to look at a panoply of assets in terms of how this could possibly be achieved if we were to go forward with the activity. And then to come forward with at least a proposal saying we think we could do the following. Now that takes some planning and some time. It is not something that the President suddenly having a light bulb turned on and saying, I think I'd like to intitiate a covert action today. Is that not true?

Mr. McMAHON. The gestation period for the generation of covert actions have varied over the years, but I think your statement is valid. There is an assessment made not only of the capabilities to carry out what is desired, but also the risks associated with that.

Senator COHEN. And as I understand the testimony to date, and in my experience with the present administration, with the exception of the mining of the harbors of Nicaragua, I am not aware—based upon statements coming from the President and his spokespersons—aware of any example other than the Iran affair where there has not been notice given to the Congress in advance. Are you?

Mr. McMAHON. That is my understanding and my experience, Mr. Chairman.

Senator COHEN. I find it hard to accept the proposition now that with a 48-hour period notice requirement that suddenly there may be circumstances in which we can't notify Congress, that this would somehow jeopardize our national security interests. Now you come forward and I believe you support the 48 hour requirement?

Mr. McMAHON. I do. I come from the position that this oversight committee has to be an integral part of our intelligence program. And as such it has to be a partner, particularly since it holds the purse strings, as well as the conventional wisdom of our nation.

And I also believe very strongly that unless covert action has bipartisan support it is eventually doomed for failure. I would feel very reluctant as an individual to be commissioned not to advise the committee of something and them come back in a week or two and ask the committee to support a program that requires more money and what have you. I think you have to develop a relationship of trust. And I hearken back to Mr. Clifford's comment, if there is concern regarding the security of a committee member, then that should be addressed immediately upon his appointment. And I believe that the Congress itself bears a burden to make sure that the membership of this committee is the kind that won't be either a fast or slow leak.

Senator COHEN. My time is up. Thank you, Mr. Chairman.

Chairman BOREN. Thank you very much. Senator Hecht.

Sentor HECHT. Thank you, Mr. Chairman. Maybe I did not get it correctly. Do you endorse any of this legislation that is before us today and which one if you do.

Mr. MCMAHON. Do I endorse this?

Sentor HECHT. Yes.

Mr. MCMAHON. I would endorse the 48 hour rule or a 72 hour rule or some definite period for advising the committee.

Sentor HECHT. So that one point you endorse?

Mr. MCMAHON. The others I would refrain, urge the committee to refrain from anything that approaches upon the revelation of sources, methods or for that matter total liaison involvement in a public fashion.

Sentor HECHT. Isn't that basically the law today, for the President to advise us? Fact was a mistake was made, it wasn't done, but isn't that the law today?

Mr. MCMAHON. I believe the law gives the President the provision to direct the Director of CIA not to advise Congress.

Sentor HECHT. Not to advise Congress?

Mr. MCMAHON. Yes. On a finding.

Senator HECHT. OK. I'll pass over that.

Mr. MCMAHON. I believe that is where the question of timely fashion is concerned.

Senator HECHT. I don't want to go into that at this moment, but I have a couple of differences of opinion on that.

Secretary Carlucci brought up a very, very important point which has troubled me too. What about an area commander. You know the CIA is not the only intelligence apparatus which can do a covert operation. What about a military commander in military intelligence?

Mr. MCMAHON. I believe that military commander is associated with an action, I won't call it directly a covert action, which would be deceptive to the enemy. I don't view that as a covert action which the CIA would call out. I do recall that the House Select Committee on Intelligence began to approach this a number of years ago, but never reached a resolution and we just focused it back away from the Department of Defense back on the Central Intelligence Agency. I understood the provision of this law to mean that when the President directs a department to carry out a covert action in lieu of what CIA would do or in support of CIA, then that would come under the ground rules of a covert action, quite opposed to an independent threatre commander doing actions that might be termed deceptive.

Senator **Hecht**. We're dancing around words, how would you describe Grenada?

Mr. **McMahon**. That was an invasion of an island. And there was advise was given to the committees. We were directed to make sure that the committee members were advised before that operation took place and we so did it. I tracked down Senators at midnight to advise them. But that is a military action, not a covert action.

Senator **Hecht**. These definitions I find very difficult, just like clandestine operation and covert operations. I find it very difficult to define and I am certain the different ones who are going to be involved would also find it very, very difficult to define. This is one of the reasons that I don't like a lot of legislation that, as I brought out before, ties our hands and allows our enemies to operate any way they wish.

Mr. **McMahon**. Well, a simple ground rule that I always used, Senator Hecht, was that if it's the collection of intelligence then it is clandestine; if its anything else, then its a covert action.

Senator **Hecht**. My time is up, thank you.

Chairman **Boren**. Thank you, Senator Hecht. Senator Warner.

Senator **Warner**. Mr. McMahon, I am glad to see you again. You are one who finished a distinguished career and has gone onto another distinguished career and we are delighted that you have taken the time to voluntarily come back here today and share your views.

Mr. **McMahon**. Thank you, Senator. I have had 34 and one half years with the Central Intelligency Agency.

Senator **Warner**. And during that period how many years were devoted to say the covert side or portions thereof?

Mr. **McMahon**. Well they had 5 years overseas and then I worked briefly in counterintelligence for about 6 months and then later in my career, much later, I ran the office that provided technical support to our agent operations, and that was for almost 2 years, and then finally I was the Director of Operations for about 3 years.

Senator **Warner**. Were you present this morning when Secretary of Defense Carlucci commented on this legislation?

Mr. **McMahon**. Yes, I was, Senator.

Senator **Warner**. And did you hear him give his opinion based again on extensive professional experience in wide range of government positions, that a proposal of the 48 hour type that we have before us today in the legislation, would denigrate the relationship between our Nation and other nations in terms of the conduct of covert operations. Do you have a view on that?

Mr. **McMahon**. I would not associate the conduct with foreign nations in that fashion. I don't think the 48 hour rule bothers them that much. What bothers them is that any association they have with CIA, whether providing intelligence information to CIA, or assisting CIA in a covert action, become public. If we can hold it quietly, then they accept it. And I believe the nations of the world early on were very reluctant at the formation of the oversight committees because they felt their associations would be exposed and jeopardized. I feel that they have come to appreciate the facts of life that we will report, but that we will protect their involvement wherever possible.

Senator **Warner**. Well, let me sort of bisect the question. They now presumably have recognized that oversight is going to continue and we are really today fine tuning the magnitude of that oversight and more specifically the time in which Congress through perhaps 8 leaders has an opportunity to express their judgment, a valued judgment, on certain proposed covert operations that have been intiated. Now given that, supposing we need to acquire from another nation some of their intelligence because our activities are going to take place in a geographic area over which they have specific knowledge or knowledge perhaps superior to ours. Would there be a reluctance, do you think, if they were time sensitive, to share that knowledge if they felt the President had to again share it with a wider range of individuals?

Mr. **McMahon**. I believe that is correct, Senator, that a number of nations would refrain from supporting us for fear that their association might become public.

Senator **Warner**. So then we have to balance the wisdom of this check and balance system of our government and informing the 8 leaders, so that their judgment can be brought to bear on this sensitive situation.

Mr. **McMahon**. That's correct.

Senator **Warner**. Against potential loss of valuable information to assist in an operation.

Mr. **McMahon**. Yes sir.

Senator **Warner**. And that is a tough judgment call.

Mr. **McMahon**. Yes sir.

Senator **Warner**. Do you see the world changing in such a way over the span of some 30 plus years that you have been in to now justify here in 1987 such a 48 hour rule.

Mr. **McMahon**. I don't think the world has changed, but the U.S. has changed. We are a very open nation and we have our way of life and I don't think we have even approached resolving the problem between what is the prerogative of the President and what are the responsibilities and prerogatives of Congress.

I would commend to everyone's reading, an article in the Foreign Affairs, this winter's section of Foreign Affairs on foreign affairs and the constitution by Louis Henken, who is a professor at Columbia University. Not being a student of constitutional law I found this very informative, but I also found myself falling on and off the log as to which side I was on.

Senator **Warner**. I am going to fall off in one minute and I'm going to lose my time. So I want to come to the very precise point. I am concerned about the expanding role of terrorism. We proudly remain a Nation under the rule of law. Some nations have no laws. Certainly the organizations have none. This concerns me as to whether or not we are moving in a direction to tighten up a bit when so much of our threat is moving in a different direction, where there is absolutely no accountability whatsoever. Do you have any concern about that?

Mr. **McMahon**. I do have concerns on any encroachment which Congress might have on presidential prerogatives. But in the case of covert action, I think that Congress must play a role as much as the President, and I would like to think that arrangements can be made between this committee and the President which will permit an understanding and appreciation of our covert activities in a timely fashion.

Senator **Warner**. Well I commend you on your forthright expression of views. I presume that, your views are consistent with, if there is one that's traditional to the profession, how the professional would vote on this?

Mr. **McMahon**. I would like to see a covert action advised to the committee within 48 hours or some stipulated time frame that can be agreed between the President and this committee. But don't leave it open ended. Senator, every time that happens, and fortunately it hasn't happened that much, but the organization that pays the price is the Central Intelligence Agency, not the presidency.

Senator **Warner**. That is the point. How would they vote on this if they were given the opportunity in your judgment?

Mr. **McMahon**. Well, I would have to refer back to Senator Cohen's quotes of Mr. Gates and Director Webster during their confirmation hearing when they thought that 48 hours wasn't a bad idea. If I am quoting you correctly, Senator?

Senator **Cohen**. You were.

Senator **Warner**. I thank the Chair.

Senator **Boren**. Thank you very much, Senator Warner and Mr. McMahon.

One last question, Senator Cohen?

Senator **Cohen**. Just to make it very clear. Senator Warner raised two issues with you. One, the involvement of other nations or identification of third countries or parties; and the 48 hour notice. Put it directly: Will the 48 hours notice tie our hands or injure our intelligence agency?

Mr. **McMahon**. I would have to rely on history to say no. My ability to forecast future events is muddled.

Senator **Cohen**. But in terms of the 48 hour notice——

Mr. **McMahon**. If history is any teacher, I don't think 48 hours would be too large an impediment to impose.

Senator **Cohen**. Thank you.

Chairman **Boren**. I gather on this same matter, though, you would feel even more comfortable with a provision of 48 hours notice, which you advocate, if we were not to require explicitly in the statute that third countries be named if they were participants.

Mr. **McMahon**. Yes, sir, I don't think you want to name third countries or even approach to discussing sources. That is part of fiber of an intelligence organization and if you expose that you strip them of the ability to provide the confidentiality that our sources and our liaison contacts feel they deserve.

Chairman **Boren**. So you feel we should omit that reference in the legislation. I know Senator Cohen has expressed willingness to do that.

Mr. **McMahon**. Yes sir, very strongly.

Senator **Cohen**. Just for the record the author of that article in foreign affairs, Louis Henken, wrote a letter to the committee endorsing the 48 hour notice requirement. So that he is not off the log on that one.

Mr. **McMahon**. I think that he comes out very much of that. But if you trespass through the article, you find that indeed as he quoted Justice Jackson back in 1954, that in addressing the constitutionality between the President and Congress there is a zone of twilight often where authorities are concurrent and as Mr. Carlucci said, the resolution to that is beyond my pay grade.

Senator **Cohen**. Now we are looking for concurrent jurisdiction so that we at least have some role and not be relegated to the back of the theatre and watch a covert action being played out without having some voice in the script itself.

Mr. **McMahon**. Indeed.

Chairman **Boren**. Thank you again, Mr. McMahon, for joining us.

Mr. **McMahon**. Thank you, Mr. Chairman.

Chairman **Boren**. We appreciate your taking the time and, again we appreciate your outstanding service in the intelligence community of this country. Thank you very much.

Mr. **McMahon**. My pleasure.

Chairman **Boren**. Our concluding witness this morning will be Mr. Michael Armacost, the Under Secretary of State for Political Affairs. Secretary Armacost, we are very glad to have you with us. We of course have been in communication with the Department and had a very kind letter from the Secretary of State expressing his interest in this legislation and his desire to have the views of the Department presented to us. We certainly value that input from you, from him, and from the Department. We certainly understand with all the responsibilities he is facing and having been overseas briefing our allies in the aftermath of the summit, that it has been difficult to arrange his schedule where he could appear in person for us in time for us to conclude these hearings as scheduled, so that we can commence our mark-up session. But we very much appreciate your presenting the views of the Department and the Secretary. Please convey also to him that this as this process goes forward, we continue to solicit his thoughts as the proposed legislation evolves through the mark-up process and on into floor actions. We welcome you this morning and would receive any statement at this time that you might wish to make.

STATEMENT OF MICHAEL ARMACOST, UNDER SECRETARY OF STATE FOR POLITICAL AFFAIRS

Mr. **Armacost**. Thank you very much, Mr. Chairman. I appreciate the opportunity to testify on this legislation and we appreciate also your kind offer to allow the Secretary if he feels I don't adequately express the views of the Department, to have another shot at it before it goes to the floor.

Judge Webster has explained in detail the reason why the Central Intelligence Agency has reservations about this bill, and I think Frank Carlucci spoke this morning and expressed the Defense Department views. You have already had testimony from Chuck Cooper at the Department of Justice on the constitutional aspects of 1721 and there's no need for me to repeat all of the specific comments that they made.

But I would like to put this legislation in the perspective of a common effort to improve the relationship between Congress and the President on intelligence matters. And the question I want to address is whether it will enhance our ability to use covert action and intelligence resources to further our national interests, and whether it will serve the American people.

A covert action in the view of the Department remains a very critically important tool of U.S. foreign policy. The United States should resort to covert action only when it is essential to advance or protect vital interests. A decision to engage in such activity entails a judgment by the President that the revelation or acknowledgment of U.S. involvement in a particular activity in a foreign country will hinder this successful accomplishment of our foreign policy and security interests.

Our most fundamental problem with the bill is the absolute requirement to notify Congress within 48 hours of the adoption of a written finding, combined with the deletion of the references in present law to the constitutional authorities of the executive and legislative branches. This absolute 48 hour requirement may not be reasonable when extremely sensitive operations require extraordinary security in order to protect human life, as in the case of the 1980 Iran rescue mission. As the Justice Department has testified, we believe also that this requirement would infringe upon the President's constitutional authority to conduct foreign policy, including sensitive intelligence operations.

It is difficult, to be sure, to envisage the precise circumstances that might delay notification beyond 48 hours. It think we would all say that such circumstances are certain to be extremely infrequent. Yet it would seem inappropriate to infringe on the President's constitutional prerogative to decide how best to carry out the nation's foreign policy in a crisis. Naturally the President must satisfy himself that the contemplated actions are consistent with U.S. law, policy objectives. He must take into account the need for support from the American people and their representatives in Congress in the event of disclosure. But to tie his hands in advance on how he discharges this obligation seems neither wise policy nor sound constitutional law.

In our view and in the view, as I recall of the Tower Commission, the existing laws on congressional oversight provide an adequate statutory framework for congressional notification and consultation on new proposals for covert action as well as existing programs. Problems which assuredly arose in the Iran-Contra affair have been addressed by the President. He has implemented new procedures. He has selected new people to exercise central responsibilities in connection with intelligence matters both at the CIA and at the NSC staff. The bill before us takes the approach of imposing by statute a rigid new procedure for oversight and accountability. It does so in a manner that could exacerbate executive-legislative frictions rather than encouraging the spirit of cooperation required for effective policy and oversight.

I would emphasize the damage that this bill could cause to our ability to enlist the cooperation of foreign governments in intelligence operations or matters. The requirement to identify in Findings all foreign countries which might have any possible role in a special activity will increase their fears of disclosure and diminish their confidence in our capacity for discretion. The same is true with respect to the sweeping requirement in the bill to provide any document of any kind requested by Congress without the language in the present law that makes this subject to the constitutional authorities to the two branches and the need to protect sensitive information and sources. We strongly oppose this provision, in part because it implies that Congress could insist on access to sensitive documents that are part of the deliberative process, including documents containing candid advise to the President from members of the cabinet.

Both the Congress and the Executive Branch have reflected very extensively on the lessons of the Iran-Contra affair. There is no need for us to remind ourselves of the absolute need to avoid a repetition of that unfortunte episode. It is of course true that the Iran-Contra affair demonstrated a need for better procedures to deal with covert actions. The President has taken forceful steps in this area. I believe the committee has been fully informed of the new and rigorous procedures that have been adapted in the Executive Branch. These procedures are working well and I believe they will ensure that all proposed covert actions are reviewed in a careful manner, taking into account the necessity for action, their consistency with our foreign policy objectives and the law, and the appropriateness of the means and the prospects for public understanding and acceptance if the activities are disclosed.

The problems we face are not inadequacies in the law, but the need to restore confidence and trust between Congress and the Executive Branch in managing these sensitive activities. We don't believe the solution is to pass a bill which could rekindle suspicion or provoke confrontation of our constitutional question. We think it is time to allow Judge Webster and the other senior officials who have been charged with implementing these recently revised intelligence procedures the chance to demonstrate these procedures at work. We see this as operating to the mutual advantage of the Congress and the Executive Branch. We therefore urge the committee not to recommend adoption of the legislation.

Chairman Boren. Mr. Secretary, let me ask. You have raised the question about executive privilege and the possibility that under the legislation the committee might require submission of documents, for example, that would convey private advice given the President by his own advisors. I would certainly agree with you that that's not an appropriate matter under any kind of normal circumstance into which Congress should intrude. That the President, as matter of executive privilege and prerogative should have the right to receive on a confidential basis advice, for example, on communications from his own immediate staff.

The current law has a proviso in it which says that provisions are subject, I think it says, "to the degree consistent with the responsibilities of both the President and the Congress under the Constitution." In your opinion, if we were to have some sort of general proviso—of course the burden would still be upon the President were he to assert any such constitutional privilege to show that it was justifiable—would that in your mind improve the legislation or would it have no impact on the legislation, from your point of view?

By the way before you came we had already discussed the fact that on the third countries there is a willingness on the part of many members of the committee, including the principal author Senator Cohen, to remove the requirement that third countries be named in the Finding. If that were removed and if there was some sort of general constitutional disclaimer, would those changes in your view improve the legislation from the point of view of the Department?

Mr. ARMACOST. I think they would, Senator. I have understood—and I am not frankly up to date on what has occurred in the markup—but it's my understanding from talking to several of those who are present and have followed this very closely, that in discussions with the staff at least those issues that involve third countries—information relating to third countries, information relating to sources and methods and the degree to which we would be subject to requests for information that touched on the deliberative process, have been discussed and possible arrangements have been worked out. But certainly our concern was omitting language in the previous law that protected our view of the constitutional prerogatives of the President. It was one of the features we found objectionable, and restoration of such language would improve the bill from our standpoint.

Senator COHEN. I think there is some confusion about the restoration of the constitutional language. Constitutional language or reference to the President's constitutional power in the existing law only pertains to prior notice. It does not apply to timely notice. There is some misconception either within the Department or the Department of Justice or within the Administration. The only reference to the President's constitutional power applies to prior notification and has nothing to do with timely notice.

Mr. ARMACOST. I see. Well, I stand corrected. Maybe my lawyer here has an additional comment to make. But as I understood the question it sounded as though that fix would be helpful from our standpoint.

Senator COHEN. I think the Chairman was referring to something else in terms of including reference of third parties or countries in the Finding itself which would be removed under a revised version. And what he really meant to ask you, would you then support the bill?

Mr. ARMACOST. Well, as I said in my testimony, our principal objection is to the 48 hour—the absolute 48 hour notification requirement. That I think is the core of our problem and our reservations about it are in part constitutional. I don't have anything to add to, or the qualifications to add much to testimony received from the Justice Department on that score. I think the arguments are familiar; you know our position.

Yes, there is practical point which at least I have heard regularly from people in the Agency. I just listened to John McMahon's testimony and found it interesting. But there are occasions when operations require immediate action, which could involve peoples' lives, where a very fast breaking situation could be impeded by this notification requirement, either because people aren't present—it would be difficult to carry it our practically—or because in the judgment of the President, to whom the constitution does confer very special responsibilities in the field of foreign policy, the operations could be compromised by that loss of flexibility. I admit surely that in the Iran-Contra affair the notification was not timely in my view. The Executive Branch has itself created a procedure that would require regular assessment in any case where an exception to the normal practice of informing you within 48 hours was deemed appropriate.

Senator COHEN. Mr. Armacost, on one hand you cite the Justice Department for its views on constitutionality and then you express disagreement with Justice Department because they have indicated that timely notice is whatever the President says it is. In other words, Congress can't proscribe the definition of timely notice, because that is in the President's sole prerogative. So you are expressing——

Mr. ARMACOST. What I am saying, Senator Cohen, is that the Executive Branch has established a pattern of reporting these things to you essentially within 48 hours but asserts the constitutional right to the flexibility needed in extraordinarily exceptional cases to withhold that notification for longer periods because of the sensitivity of the operation, because of the fear of loss of life, and because the President believes that under the constitution, ultimately he does possess that authority.

Senator COHEN. If that is the case, why in the Iranian affair, was timely notice in your judgment not given? After all lives were at stake. Ten months transpired before notice was given. Why in your judgment was timely notice not given because lives were at stake?

Mr. ARMACOST. I can't say, Senator, because we were not a part of those deliberations, as you recall from the episode. The Secretary was first informed—the Department was first informed—of the finding in November and therefore any discussions on this issue were not a discussion to which we were a part.

Senator COHEN. I am trying to inquire in terms of your judgment and experience, why do you think that notice should have been given before the 10 months as opposed to the way in which it occurred, if in fact timely notice means giving the President whatever flexibility he feels he needs. And what in your judgment was wrong with the way in which that was handled in terms of its notification, if in fact the test is lives are at stake?

Mr. ARMACOST. I wasn't making a detailed comment, I was simply reflecting I think a general judgment that in retrospect——

Senator COHEN. This is all coming out of the Chairman's time, I'll get to my questions in a minute. [General laughter.]

Chairman BOREN. I didn't really recognize that I was still asking questions, Mr. Secretary. But let me ask this question. How would you cure the problem that we have now? You have said that in most circumstances you think that notice should be given and could be given within 48 hours. The President said that himself in his letter to us. He said he will notify us in all but the most exceptional situations where he is asserting his constitutional prerogatives within 48-hours. Now, absent legislation—or if you don't like the way we formulated this timely notice factor, the 48-hour notice in this legislation, how would you plug the loophole, if you were writing this legislation yourself with no constraint upon you? How would you close the loophole that obviously now exists in the current law where timely notice is not defined, is totally open-ended, and where we had a situation where obviously any reasonable definition of timely notice was abused in the Iran-Contra affair?

I think that without getting into the argument as to whether or not the President violated any constitutional responsibility, it is natural the Justice Department is going to defend the President because they don't want the President accused of violating his constitutional responsibilities. But let's lay that argument aside. Let's just talk about what is a reasonable definition of timely notice. If you don't like the 48-hour information, how would you protect then against the possibility of the extreme abuse of having another 10-month situation develop; and perhaps a situation that was not leaked. We might have never known about the Iran-Contra operation, the diversion of funds, the generation of funds really essentially generated from the sale of government property to be then used potentially for off-the-shelf operations maybe in scores of other places around the world. Now that really does get the policymaking of this country and the actions of this country beyond any kind of a process that we view as a constitutional process. People lose all control, no ability to appropriate funds or control operations. In this case according to testimony, the President himself was not informed about diversion of funds. We were left with no authority under the Constitution of this country. No person elected by or accountable to the people of this country had any knowledge at all about how the sale of their own property, taxpayers' property, was being used to generate funds to conduct other operations. Now how would you prevent that? How would you plug that loophole?

Mr. ARMACOST. I think our view, Senator Boren, as the Tower Commission concluded, and I believe the congressional committees that have looked into this have also concluded, the problem wasn't inadequacies of statutes, but the failure of individuals charged with those responsibilities to observe the law.

And we have taken those lessons to heart by going through a very rigorous review ourselves of procedures within the Executive branch. I presume Frank Carlucci went through those with you this morning, because he played a very central role in the NSC's revision of our procedures. And I participated in that and thought it was a very thoughtful and thorough process which we now, I think, have. It is a very rigorous set of standards which we put through ourselves. And we also accept the fact that in all except the most extraordinary and exceptional circumstance, the reporting would be within 48 hours. That is the general principle to which we subscribe. We simply would like to preserve the flexibility in the extraordinary case for an exception.

But we believe the comity between this committee and the committee in the House and those who are responsible for sensitive intelligence operations creates the kind of relationship in which we not only understand the importance of providing timely notice to the committee, but also recognizes the importance in virtually all cases of the advice and counsel that we receive from those of you who are elected officials and who are charged with the oversight responsibility.

Chairman **Boren**. The problem with the lessons that we learn from these experiences—and there is no doubt that both ends of the avenue are working very, very hard to repair this relationship, there is a real sensitivity to what happens when there is not candor with the oversight process, when that relationship breaks down, so at least for now there's a real effort being made. But the problem is that these lessons over time seem to fade. And it seems that we have to re-learn these lessons every decade or so in this country by repeating the same kind of tragic mistakes.

Would you support legislating the procedures specified in the National Security Directive—by the way, the unclassified version has been entered into the record by Mr. Carlucci today—under which, if the President, in essence what the President does in his NSDD is establish a third track. There is prior notice. There is notice after the fact within 48-hours, either to the entire committee or in more restricted circumstances to the group of only eight Members. And then there is a third track. If the constitutional prerogatives are being asserted for reasons of important national interests, that the President will undertake a periodic review with, in essence, the members of the National Security Council, his principal national security advisers, the Secretary of State included—I believe it is every 10 days. Is that correct?

Mr. **Armacost**. That's our procedure, yes.

Chairman **Boren**. Is that a formulation that you would advocate for possible enactment? Because again what worries me, as the experience fades into memory and another President comes into office in a few months from now and another Administration and another Administration after that, what is to make sure that those procedures are followed and not changed if we do not legislate?

Mr. **Armacost**. We obviously accept the procedures, since we've enforced it on ourselves. I think I would prefer, Senator, to submit to you an answer in writing so I don't reach the views of lawyers who are protecting institutions over the longer haul. But I'll be happy to submit that response in the record.

Chairman **Boren**. Senator Cohen?

Senator **Cohen**. I have a few observations to make and perhaps a couple of questions to Mr. Armacost.

You indicated before that covert actions is an important tool and we agree. For the first time in statutory language, we specifically endorse the use of covert action in order to carry out foreign policy objectives. So there is no disagreement with the State Department and the Administration on the need for covert activity in certain limited cases.

But I have to disagree with your statement that somehow this legislation infringes upon Presidential power. We do not take away one foot or yard or inch of Presidential power to act. All we are asking for, and I think we are entitled, is to be advised of that action. So there's no stealing of turf here. We're not intruding upon the President's power to act. It is simply that if he does take action in a fashion which is secret and covert and is inconsistent with our normal processes—open and vigorous debate in public—then at least eight Members of the Congress ought to know about it. And they ought to know about it very soon. I would insist not on a three track policy such as that of an NSDD but two tracks at best.

I would insist upon prior notification on almost all possible conceivable circumstances. Except in the most remote contingency which I can't conceive of now, would I then say I'll tell you afterwards, and that should be within a 48-hour period.

You indicated before that the procedures were adequate. The statutes were adequate. And the question comes to mind if they were so adequate, then how did we have what you describe as an unfortunate episode in Iran? Was it the people? Was it the Director of Central Intelligence Agency? Was it the the Department of Justice? Was it the Secretary of State? Secretary of Defense? What was inadequate about it if the procedures were sufficient and the laws were sufficient?

How did it happen if the procedures were there?

So I think there is a basic inconsistency in that. What we found out is the procedures were not adequate. The law in the manner that is currently interpreted is giving the President unbridled discretion in notifying the Congress, and that is not adequate.

So I think there's probably a fundamental difference there as to how the incident occurred, because the people were all good people. There was no one who was acting from malevolence in trying to undermine the government. In that respect, they believed they were following the law. They got written opinions that said that you could do this. So I think there was a basic disagreement whether the procedures were adequate.

There are new people. And I think that we have stated over and over again how pleased we are with the changes that have been made and the kind of relationship that we do have. There are new procedures, not entirely acceptable to all of us, but new procedures nonetheless. But you've indicated that by adopting statutory language it would do damage to our capacity to deal with third countries. I'm curious about that because—I've read before and you were not here so I'll read it again—we have a letter to Chairman Boren by President Reagan with copies to Congressmen Stokes and Hyde which said the following, "The Intelligence Committees should be appropriately informed of participation of any government agencies, private parties, or other countries involved in assisting in special activities." So the legislation really was only incorporating what the President himself said ought to be done. And I doubt very much whether the President would send a letter that would in fact damage our capacity to deal with third countries.

Nonetheless, I've indicated that I'm prepared to be flexible on how to deal with that so that you don't jeopardize that relationship.

A final point about why I think it is important that some sort of notification be given as to who we are dealing with and under what circumstances. I recall the Secretary of State was quite firm on this issue. When the Administration had to go elsewhere to seek assistance for the Contras—and this came out during the hearings—there was a review of a list of countries that certain officials went through. Secretary of State Shultz, when presented with certain countries, x, y, or z or 1, 2, 3, 4, or 5, said no, those particular countries will demand too much. That was his reaction to it. They will demand too much. Unbeknownst to the Secretary, he didn't know that several of those countries had already been solicited. But the reaction was that they would demand too much in return. Because we know that whenever there is a quid there is always a quo somewhere down the line. The Secretary of State knew that.

And surely when it came to the country of Brunei, when they finally settled upon the country of Brunei to solicit and Mr. Abrams went to London to meet with one of the intermediaries, what was the first question? The question that Mr. Abrams asked—Secretary Abrams asked, will you provide some money for the Contras and what did the representative from Brunei say. What's in it for us? What's in it for us?

I think that whenever we do depend upon third countries, be it financial, be it military, personnel, whatever, somebody in this body has a right to know that commitments are being made in our name and in our country's name and we should have a voice or at least be able to express concerns or disagreements or even indeed support. And one of the ironies of all this is that this Administration has had more support from Congress than perhaps anyone would come to believe. Almost every action has been approved in a sense that we have listened to it, we've disagreed with some, but for the most part, the Administration has had great success in dealing with this Congress.

The only time that I am aware of other than the mining of the harbors, the only time that I am aware that the President felt he couldn't come to eight Members of Congress was in the Iranian affair. And that was, in my judgment, because of two things. Number one, it totally contradicted the public policy which Secretary Shultz later stated he was embarrassed about. He was in Europe promoting Operation STAUNCH while we were covertly, or privately, clandestinely promoting a different private policy. And second, that there was such deep division within the Administration itself. The Secretary of Defense and Secretary of State Shultz were adamantly opposed to the concept itself. I think was the reason that Congress was not notified. Not because lives were at stake. We know lives were at stake. Lives are at stake in most covert actions. But because the Administration knew that the policy would be controversial and the President perhaps would hear advice he didn't want to receive. That was the reason.

So I think—I have enormous respect for you. And for Secratary Shultz, obviously. You have worked closely with us. We've always treasured your particular advise and insights and will continue to do so. But there is a rather strong disagreement about the role that Congress has to play. Not to trespass on the powers of the President, but to be apprised when the President is taking action which is outside the normal open processes that we cherish.

Mr. **Armacost**. If I might just comment, Senator Cohen?

Senator **Cohen**. Sure.

Mr. **Armacost**. When I said that we felt no legislation was required, I was really citing not simply a judgment of the Executive branch, but what we've taken to be conclusions of the Tower Commission which looked into this rather thoroughly and had a very distinguished former Senator among the Commissioners, and what we've seen as part of the conclusions in the congressional investigation of the whole matter. Not that there were not mistakes that didn't need correction, but questions as to whether additional laws would have avoided the problem simply do not answer the question because in this case clearly there were people who didn't really observe the law that existed.

Senator **COHEN**. The Tower Board only looked at a part of the entire investigation. They had limited access, limited time, did not have as much information as the Iran-Contra Committee had and I'd point out that several key members of the Iran-Contra Committee, including Chairman Inouye, Vice Chairman Rudman, Senator Mitchell and others have concluded that a 48-hour requirement is indeed desirable.

Chairman **BOREN**. Well, I again want to express my appreciation to you for appearing and also ask that you convey again to the Secretary our desire to have his views. As I have said to several members of the Administration, it appears to me that there is very strong likelihood of legislation. We want that legislation very sincerely to be as good as it possibly can be. I think the more input that we can receive from the Administration as we go through the process, even if the Administration should decide ultimately for reasons of Constitutional philosophy, that it would resist final enactment of legislation. It's imperative that we do keep this communication open so that the legislative product can be as good as it possibly can be. And hopefully in that process, we may find ourselves more in agreement than disagreement by the time that it is all over.

Because, while I agree that as much as anything else, it was a failure to follow the process that was already in place. As I've stated many times, there were memoranda of understanding between this committee, for example, and the CIA, clear understandings between the Executive branch, procedures within the Executive branch for review of policies you've mentioned just have been put in place now that were in place then—that simply were not followed.

So a good part of repairing the damage that has been done is to make sure that all of us carefully follow the appropriate processes that are in place, that our communication and our oversight responsibility here be systematic, and that there be systematic communication between the two branches of government. I think that we've gone a long, long way—and I would want the record to reflect this—in improving that relationship, I do think at this point in time, between those individuals, the Secretary of State, the Secretary of Defense, General Powell, the Chief of Staff of the White House, the President himself, I think that there is a relationship of trust on both sides. That's been communicated to me. I would include Judge Webster in that. It has been communicated back to this committee that he has great confidence in this committee and the way in which we are safeguarding confidential information and communications. We, likewise, have that kind of confidence in those individuals with whom we are now dealing. We're getting the information we need, our questions are being answered in a straightforward way, or we are being told they can't be answered and then we resolve those matters. We've been able to resolve communications successfully. So, great progress is being made.

But I'd like to think if we can further improve the processes, including some statutory enactment that would be binding on later Administrations and do it in a way that will not do damage to the President's constitutional responsibilities, that this will contribute to this relationship. So that we have ground rules that are clear to everyone, and that we not have ambiguities in the statute. I think if we do this the right way, hopefully it can make a positive contribution to build on the progress we already made, rather than become a bone of contention. And it certainly is in that spirit that we hope to operate and welcome the continued input from the Administration.

Mr. **Armacost**. We're happy to approach it in that spirit. And as I've said, Senator, I think our people have been in touch with you about some of the issue that came up with other witnesses and have been working with your staffs to get some fixes.

Chairman **Boren**. The hearing will stand in recess.

[Thereupon, at 1:11 o'clock p.m., the hearing was recessed, subject to the call of the Chair.]